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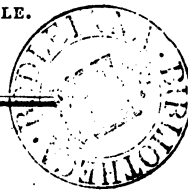
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A
PRACTICAL TREATISE
ON
THE LAW
OF
PRINCIPAL AND SURETY,

PARTICULARLY WITH RELATION TO
MERCANTILE GUARANTIES,
Bills of Exchange, and Bail Bonds.

BY
WILLIAM THEOBALD, ESQ.
OF THE INNER TEMPLE.



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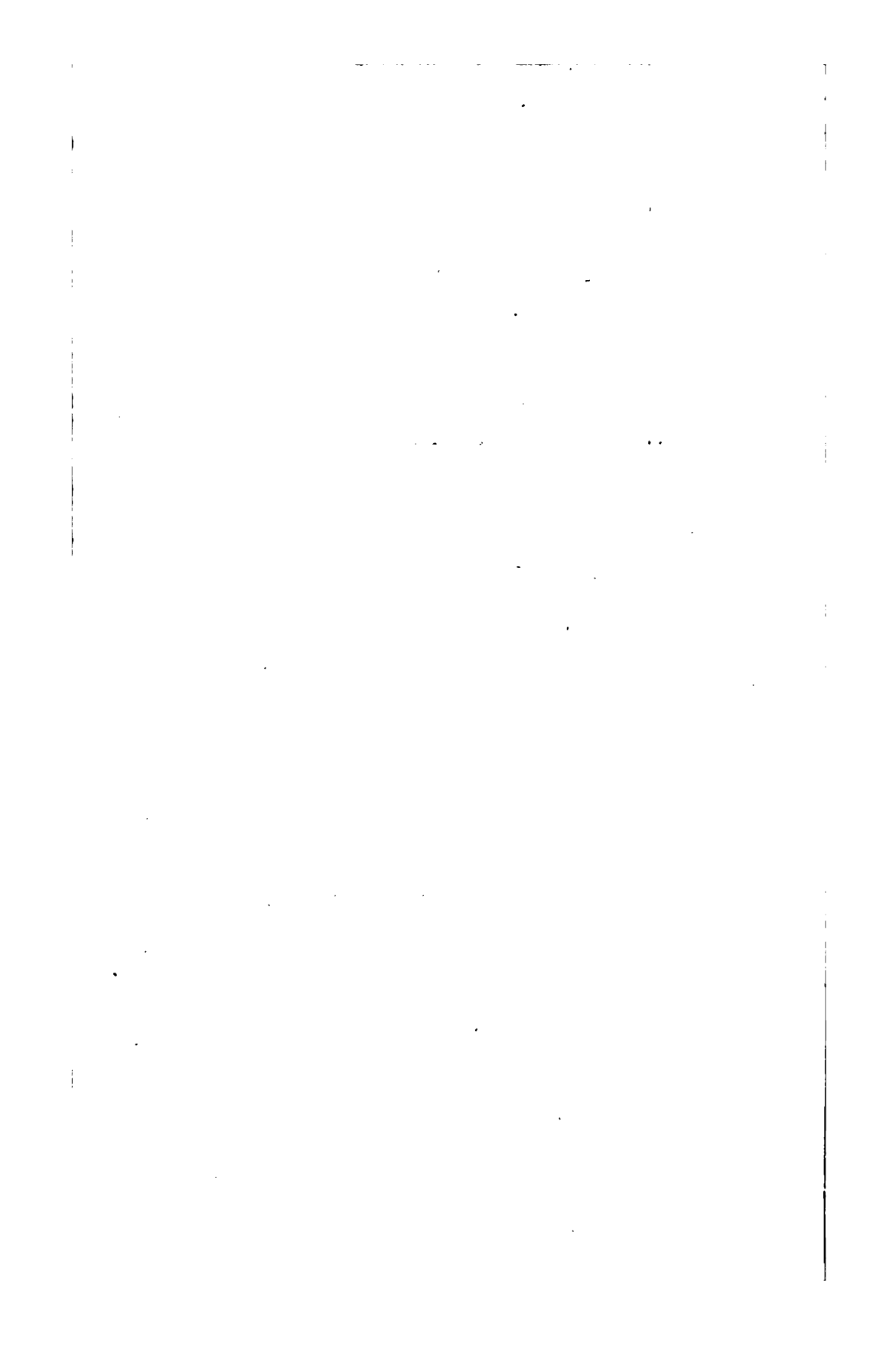
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TO
WILLIAM TAYLOR, ESQ.
of Norwich,

AUTHOR OF
ENGLISH SYNONYMS DISCRIMINATED,
AND OF
AN HISTORIC SURVEY OF GERMAN POETRY,

THIS BOOK IS DEDICATED
BY HIS MUCH OBLIGED, AFFECTIONATE
AND FAITHFUL FRIEND,

WILLIAM THEOBALD.



P R E F A C E

IN the spring of last year, the liberality of Mr. Amos, the learned Professor of English Law in the University of London, afforded me the opportunity, during his absence from town, of delivering, at that institution, a short course of lectures on the Law of Principal and Surety; the favourable reception of which by the class, as well as some testimonies of approbation from friends who had read a brief sketch of them in the *Legal Observer*, encouraged me to attempt the more important task of this publication. Sensible of its defects, I intreat for it, from the learned, that generous consideration which well becomes readers, who cannot but be aware of the difficulty of the subject.

Besides the defects, however, arising from this cause, there are others to which no favour is due, and I will myself unmask them, preferring any blame to the imputation of incapacity, which I should think I incurred, were I really, or did I seem blind to them;—I allude to defects of arrangement, or a confusion, occasionally, under one title, of topics dissimilar. The defects of this kind have arisen from additions made after the manuscript was sent to the printer; but I trust

they will be found to bear an inconsiderable proportion to the merits of the general execution, upon which I have bestowed great pains and labour; far greater, indeed, than the reader will imagine, who is not himself conversant with law cases, or aware of the very crude, and often scarcely intelligible, and always prolix manner, in which they are reported.

One part of my plan has been, to divest every case, as much as possible, of technicalities and statements of procedure; so that, whether the reader has studied equity or common law, or not even either, he may still have no difficulty in learning the law upon the subject.

There is one respect in which this work will, perhaps, be thought peculiar. In general, the law author confines himself to exposition, only desiring to make a compilation of extant decisions, with a slight discrimination of those which are questionable, and without investigation into general principles: and undoubtedly many works of the kind are extensively useful. Not neglecting the objects of this plan, I have endeavoured to combine with it original criticisms; these, however, I have confined to questions, the importance of which seemed an excuse for the expression of private opinion.

Should this treatise be received favourably, it is my intention in a short time to publish one, upon a similar plan, on the Law of Principal and

Agent, to be followed, I hope by a series, on other branches of the private commercial law of England, and eventually to be put in an institutional form, as a more extensive organ of instruction in this division of law than any at present existing.

WILLIAM THEOBALD.

1, INNER TEMPLE LANE,
February, 1832.

ERRATA.

- Page 9, line 24, *for* testimonial (*a*) proof, *read* oral proof.
- 33, — 22, *for* Walton, assignee of J. N. & M. W. D. *v.* Dodson, bankrupts, *read* Walton, assignee of J. N. & M. W. D., bankrupts, *v.* Dodson.
- 35, — 3 of note, *for* The mercantile world, probably, would maintain this judgment to be proper, yet I cannot help thinking that in the English Courts the case, *read* "I think that in the English Courts this case" &c., suppressing the previous remark.
- 89, note, *for* Male *v.* Wells, *read* Merle *v.* Wells.
- 97, — *for* (*a*) post, *read* (*a*) post 100.
- 204, line 13, *for* remove, *read* reserve.
- 221, "Of the Appropriation of Payments," intended to be a separate chapter, and not intended for this place.
- 233, line 3, to Copis *v.* Middleton, add also Jones *v.* Davids, 4 Rep. 277.
- 252, "Rights of the Surety with Relation to the Creditor," intended to be a separate chapter.

(*a*) Parol, the word in ordinary use to denote what is oral, may, when adjoined to the word agreement, denote either an oral or a written agreement; being, therefore, according to this usage, ambiguous, I have avoided it, and inadvertently have substituted testimonial (a word evidently misapplied in the instances to which I alluded) instead of oral.

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A

TREATISE

ON THE

LAW OF PRINCIPAL AND SURETY.

CHAPTER I.

OF THE CONTRACT OF SURETY.

1. **THE** contract of surety takes place when one person, to obtain some trust, confidence, or credit for another, engages to be answerable for him.

This contract is defined by Pothier (*a*) to be a contract by which a person obliges himself, on behalf of a debtor to a creditor, to pay him either the whole or part of what is due from such debtor, and by way of accession to his obligation.

By Mr. Fell (*b*) it is defined as follows:—

A guarantie is a promise to answer for the payment of some debt, or the performance of some duty, in case of the failure of another person, who is in the first instance liable to such payment or performance.

2. A person may accede as surety to other obligations

(*a*) Le cautionnement est un contrat par lequel quelqu'un s'oblige pour un débiteur envers le créancier, à lui payer en tout ou en partie ce que ce débiteur lui doit, en accédant à son obligation.—*Traité des Obligations*, par. ii. chap. 6, s. 1, 365.

Fidejussor est, qui alieno creditori id quod ei debetur promittit, stipulatione interveniente, et eo animo ut debitoris obligationi accedat.—*Pand.* l. 46, tit. 1, de Fidejussoribus et Mandatoribus, 1.

(*b*) Treatise on the Law of Mercantile Guaranties, p. 1.

besides those which are for the payment of money, or other contracts besides those the principal parties to which are properly denominated debtor and creditor. And therefore the definition of Pothier, as it appears in the above translation (*a*), is too narrow. But Pothier uses the word *pay* in the more extensive sense of the Latin *solvere* (*b*), and *débiteur* and *créditeur* are susceptible of a corresponding application. The definition of Mr. Fell avoids this defect, but it contains an obvious pleonasm; for, what is the payment of a debt, but the performance of a duty of a particular kind? Both definitions, however, are in the main correct, and equally with the first suggest the observations or corollaries which follow.

Corollaries.

1. The obligation of the surety being accessory to the obligation of some person who is the principal debtor, it is of its essence that there should be a valid obligation of a principal debtor. The nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal there can be no accessory.

2. By becoming surety a person does not exonerate the principal debtor (*c*), but merely contracts a liability accessory (or collateral (*d*)) to that of the principal debtor.

(*a*) Taken from the translation of the *Traité des Obligations*, by William David Evans, Esq. 2 vol. 8vo. Lond. 1806.

(*b*) *SOLUTIONIS verbum pertinet ad omnem liberationem quoquo modo factam.*

SOLVERE dicimus eum qui fecit quod facere permisit.—*Pand.* l. 50, t. 16, L. 202.

(*c*) In *White v. Cuyler*, 6 T. R. 176; S. C. 1 Esp. 200; it appears that a Mr. Low had joined the defendant's wife in a contract under

seal for the payment of a sum of money, for which the defendant was himself liable by an implied *assumpsit* as principal debtor. Mr. Low, therefore, was only a surety; and Lord *Kenyon*, C. J., said, "With regard to Low, the contract of a guarantee or surety under seal does not by operation of law extinguish the debt of the principal."

(*d*) Of the two terms, accessory and collateral, the latter is more in common use, but I prefer the

3. The surety is obliged for the same thing as the principal debtor. The practical use of this corollary is illustrated in *Read v. Nash* (a). In that case the question was, whether the engagement upon which the defendant was sued was within the Statute of Frauds; and the Court considering this to depend on whether it was a guarantie or an original promise, remarked, in proof of its not being a guarantie, that *Johnson*, the person in whose favour it was made, was not liable for the *particular debt*, damages or costs promised to be paid by the defendant. In other words, the defendant, not being obliged for the same thing as *Johnson*, was not his surety. In another case (b) also, where the defendant, an attorney, engaged for a particular act to be done by his client, and it was argued he was a surety for his client, the Court said, "he cannot be considered as a surety, for his client was not bound by the arrangement."

4. The obligation of the surety, as such, cannot exceed that of the principal debtor (c). The surety may be obliged for less than the debtor, but one who obliges himself in favour of another for more than the other is obliged for, is not a surety.

5. The obligation of the surety being accessory to that of the principal debtor, it becomes extinct by the extinction of the latter (d).

6. The surety being one who obliges himself on behalf of another, his obligation as surety is destroyed by his becoming himself the principal debtor (e). A man cannot be his own surety (f).

former, as being more clearly significant of the relation which the contract of the surety bears to that of the principal debtor.

(a) See *post*, p. 33.

(b) *Iveson v. Conington*, 1 B. & C. 160; S. C. 2 Dowl. & Ry. 307.

(c) See *post*.

(d) See *post*, Chap. On the Ex-

inction of the Obligation of Surety.

(e) See *post*, *ibid*.

(f) It is surprising that so sensible a writer as the translator of Pothier should have had so inadequate an idea of the use and meaning of the definition of the contract of surety, and its corollaries, as is

OF THE MANNER IN WHICH SURETIES MAY CONTRACT.

3. By the Statute of Frauds (a), "No action (b) shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default, or mis-

contained in the following remark: "The term *caution* or *fidejussor* appears from the whole of this discussion, to import a secondary engagement that another primary engagement shall be performed; and many of the following corollaries seem to proceed upon an engagement made in a *certain form*, which from its general character and *effect* has the *consequences* stated. But I conceive it is not designed to state, that several of the engagements which are mentioned as not being susceptible of being contracted by sureties, cannot be substantially contracted by one person for another in a different form." (Treat. on the Law of Obligations, translated by W. D. Evans, Esq. vol. i. p. 228, n. (e).) Now, the corollaries distinguish, not qualities which belong merely to a certain form of engagement, for the same form may occur in different classes of engagements, but such as are of the essence of this particular class of engagements. Besides, the definition given by Pothier is silent respecting the form of the engagement of surety, in which respect it differs from the definition in the Pandects, where this engagement is described to be *stipulatione interveniente*. The corollaries are simply deductions from the definition of the contract: they

derive their authority, therefore, primarily from logic, and their title to be considered as law rests wholly on the supposition of law being a science; nor can that law properly be called a science which rejects them. If an engagement is known to be one of suretyship, the corollaries show some of its essential conditions and consequences. If, on the other hand, it is not known whether it is a contract of this kind, then, in connection with the definition, they are criteria to establish either the affirmative or negative of the question.

(a) 29 Car. 2, c. 3, s. 4.

(b) But although this enactment prevents any action being brought upon a verbal guarantie, yet if such a guarantie has been executed, no action on the ground of the statute not having been complied with will lie by the surety to recover back his money. See *Shaw v. Woodcock*, 7 B. & C. 73; S.C. 9 Dowling & Ryland, 889. Which case was as follows:—Howard and Gibbs were the agents of the defendant as grantee of various annuities, and had allowed him to draw for some of them before they were paid by the grantors; and in the account delivered to him afterwards no intimation was given that the annuities continued unpaid by the grantors, or that he would be

carriage of another person, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

In virtue of this enactment a verbal guarantie is not binding.

4. The contract of surety, therefore, must be either by deed or in writing. Some writers would add, it might also be by recognizance. But a recognizance is not a contract, but rather the acknowledgment of one, with a view to its being converted immediately into a judgment against the recognizor. It is *res judicata*. The surety, however, it should be observed, does not lose that character by having obliged himself by recognizance; the principles of his obligation, under every form, are the same; and the difference of form makes a difference only in the procedure and evidence by which he can obtain the benefit of those principles.

CHAPTER II.

OF MERCANTILE GUARANTIES, OR THE SIMPLE CONTRACT OF SURETY.

5. By the common law (*a*) a consideration was necessary for every simple contract, whether it was verbal or written (*b*). The Statute of Frauds, in invalidating verbal

expected to repay them. From this the jury was left to infer that the defendant had been allowed to draw the annuities in pursuance of an agreement on the part of Howard and Gibbs to be answerable for them; and the agreement being executed, the plaintiffs, assignees of Howard and Gibbs, were not allowed to avail themselves of any objection on the ground of the

agreement not being in writing, or, which is the same thing, of proof not having been given of any such agreement in writing. See also *Price v. Leyburn*, Gow, N.P.C. 109.

(*a*) *Rann v. Hughes*, 7 Bro. P. C. 556; S. C. 7 T. R. 350, n. (*a*).

(*b*) The case of bills of exchange and promissory notes affords an apparent rather than a real excep

contracts of guarantie, is confined simply to that operation, and alters none of the rules previously existing respecting written agreements; consequently, in a written agreement of guarantie a consideration is still necessary. I will therefore inquire, first, What is a sufficient consideration for a guarantie? and, secondly, What is a sufficient agreement in writing?

Of the Consideration.

6. Whatever would be sufficient as a consideration in the case of any other kind of contract, is sufficient in the case of a guarantie. In general, any act of the nature of a benefit to the person who promises, or to any other person upon his request, or any act which is a trouble or detriment to him to whom the promise is made, is sufficient; and the amount of benefit, or of trouble or detriment, or its comparative value in relation to the promise, is indifferent. Thus, a forbearance to sue for a debt until half-past two o'clock of the same day, is a sufficient consideration for an agreement to pay it, made by a third person as its surety. And where a creditor had sued out a writ of *fiery facias*, and delivered it to the sheriff, and the defendant, a third person, promised to pay the debt and costs in consideration of the creditor's requesting the sheriff not to execute the writ, it was held that the mere request to the sheriff was a sufficient consideration, without any averment of the sheriff's compliance with it (a).

7. But the act intended to be the consideration must be of some legal value. For instance, forbearance is not a sufficient consideration, if the person in whose favour it is exercised is clearly not liable to a suit or action, because in such a case forbearance is of no value. Therefore,

tion to this rule, for an acceptor is not liable to the drawer, unless the acceptance was for value, or a consideration; nor is an accommo-

tion-acceptor liable even to third parties, unless they have acquired the bill for some consideration.

(a) *Pullin v. Stokes*, 2 H. Bl. 312.

as an heir is liable upon the bond of his ancestor only when the heirs are named in the bond, forbearance to sue the heir upon a bond in which he is not named, is not a sufficient consideration to support a promise either by himself (*a*) or by any other person as his surety. But forbearance, if there is only a doubtful right of action, is sufficient (*b*). The consideration of a person's doing, or omitting to do, what he was under a previous legal obligation to do or omit doing, is of no legal value; and therefore would not be sufficient to sustain a promise (*c*).

8. Definiteness and certainty, as opposed to the vague and general, are necessary in the terms of every consideration. Thus the stipulations of forbearance to sue for a time, or some time, or a little time, have been adjudged insufficient considerations (*d*); a time, some time, and a little time, being expressions which apply equally to an hour, a day, a year, or any shorter or longer period; and consistently with which the creditor might sue the next minute. Forbearance "for a reasonable time" is, however, sufficient; because what is a reasonable time the Court or jury can determine.

9. The consideration must, at the time the promise is made, be either wholly or in part executory: for instance, if a person promises in consideration of something to BE done, as in consideration of goods TO BE supplied, or credit TO BE given, it is an executory consideration, and sufficient: if in consideration of something already done, as of credit already given, or already agreed to be given, or of a debt already existing, it is an executed or past

(*a*) *Barber v. Fox*, 2 Saund. R. 135, (5th edit. by Patteson and Williams). In the notes to this case will be found very numerous references on the subject of considerations.

(*b*) *Longridge v. Dorville*, 5 B. & Ald. 117.

(*c*) *Harris v. Watson*, Peake, 72; *Stilk v. Meyrick*, 2 Camp. 317.

(*d*) See the cases referred to in Comyn's Digest, tit. Action upon the Case upon Assumpsit, (B), Consideration, (B 1.)

consideration, and such a consideration is insufficient; excepting, indeed, when a person promises, in consideration of some act which, although already done, was done upon his request; in which case the act past is a sufficient consideration (a). This, however, can scarcely be called an exception. The request which moved the act may be considered as evidentiary of an inchoate agreement, of which the promise is the completion; and so the request, promise and consideration, are one transaction.

10. A past or executed consideration being insufficient, it follows, that if a person accedes as surety to an existing agreement, or guaranties an existing debt, something new must take place, of the nature of a detriment to the creditor, or a benefit to the debtor or surety, to form a consideration for the surety's engagement.

11. A benefit to the debtor, without any benefit to the surety, is sufficient. Thus, in *Bailey v. Croft* (b), in order to facilitate the making of an agreement for which there was a sufficient consideration between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became a party to it; and it was held, that as the agreement was such as the plaintiff would not have made unless the defendant had acceded, there was a sufficient consideration for the defendant's promise (c).

(a) *Payne v. Wilson*, 1 Manning & Ryland, 708; S. C. 7 B. & C. 423.

(b) 4 Taunt. 611.

(c) From the report of *Ex parte Minet*, 14 Ves. 189, it seems Lord Eldon, Chan. supposed, that the case of *Wain v. Warters* decided that the undertaking of one man for the debt of another required a consideration moving between the creditor and surety; and the argument of the counsel proceeded upon the same supposition.

But, as *Best*, C. J., remarks, in *Morley v. Boothby*, see *post*, p. 14, "No Court of law has ever decided that there must be a consideration moving directly between the person giving and the person receiving the guarantie; it is enough if the person for whom the guarantie is given thereby receives a benefit or advantage; or if the party to whom it is given suffer a detriment or inconvenience, to form an inducement to the surety to render himself liable for the debt of the principal."

What is a sufficient Agreement in Writing.

12. The agreement, or some memorandum or note thereof, must be in writing. In the enactment (a) itself, the subject required to be in writing is described by the term "special promise;" but the writing is required to be an "agreement." For upwards of a century, however, no inference affecting the interpretation of the clause was drawn from this variation of expression; but the word agreement was regarded as synonymous with promise, and a promise in writing was held to be a sufficient compliance with the statute (b). Whilst this interpretation prevailed, the consideration, the necessity for which was determined by the common law, might be proved by testimonial evidence. But this was overruled in *Wain v. Warlters*. In that case, the plaintiff declared upon a guarantie, for which he stated a sufficient consideration; namely, his forbearing for a certain time in an action which he had commenced against the principal debtor. The plaintiff at the trial proved a written *promise* of guarantie, which was in the following letter:—

"Messrs. *Wain & Co.* I will engage to pay you by half past four this day, 56*l.* and expenses on bill, that amount on *Hall*." (Signed) *John Warlters*. (And dated) No. 2. Cornhill, April, 30, 1803.

He then offered testimonial proof of the consideration; but this proof was objected to, and it was insisted that, in requiring a written agreement the statute meant that the consideration, as well as the promise, should be in writing, and that there was no agreement in writing if only a pro-

(a) See *ante*, p. 4.

(b) In *Ex parte Gardom*, 15 Ves. 287, the Lord Chancellor (*Eldon*) said, "until the case of *Wain v. Warlters* was cited some time ago [Semble in *ex parte Minet*, 14 Ves. 189] I had always taken the law to be clear, that if a man

agreed in writing to pay the debt of another, it was not necessary that the consideration should appear on the face of the writing. That case has determined two points, first, that a consideration is necessary; secondly, that it must be in writing."

mise was in writing, because there could be no agreement without a consideration. And Lord *Ellenborough* being of this opinion, the plaintiff was nonsuited. A motion was afterwards made for a new trial; but the Court were unanimously of Lord *Ellenborough's* opinion, and they confirmed the nonsuit (a).

(a) By the case of *Ash v. Abdy*, published by Mr. Swanston (3 Swanst. 664) from the MSS. of Lord Nottingham, it appears that the Statute of Frauds is a piece of patchwork; which, indeed, might have been predicated of it, without historical evidence. It was brought by Lord Nottingham into the House of Lords, and there it received great alterations from the judges and civilians. But when the case of *Wain v. Warlters* was under consideration it was supposed that Lord *Hale* was its author, and upon this supposition, Lord *Ellenborough* argued that its terms were to be construed rather according to their legal (i. e. technical) than popular import. A more strange proposition can scarcely be conceived, than that acts of parliament are to be interpreted cabalistically, because eminent lawyers have assisted in the making of them. One consequence would be, that none but lawyers would understand them, and the public, whose conduct and concerns they were intended to regulate, would rarely be found to have complied with them, even when intending to comply with them; and this has happened in respect of guaranties, three-fourths of which, even when

reduced to writing, omit the consideration.

Another argument of Lord *Ellenborough's* in support of the new decision, was derived from the supposed etymology of the word agreement; *aggregatio mentium*. But this etymology implies that mutual promises are necessary to compose an agreement; and in this sense Plowden seems to have understood it; and *Comyn, C. B.* who translated it as "a mutual assent to do a thing." (Com. Dig. tit. Agreement (A 1)). But it is well settled that mutuality of agreement is not necessary, (see *post*, p. 15) but only a unilateral agreement supported by a consideration. The etymology of Plowden, therefore, proves too much or nothing.

Another of his lordship's arguments was drawn from the policy of the statute. This of course would apply equally to every clause; yet under the 17th section, which requires a memorandum in writing of all bargains for the purchase of goods above a certain value, a memorandum of one side of the bargain without expressing the consideration is held to be sufficient. The word bargain is regarded as equivalent merely to promise; but this distinction be-

13. This decision was at first much questioned, and in *Saunders v. Wakefield* (a) it underwent a fresh and solemn discussion. But the Court, at this time composed of four new judges, came to the same decision. The defendant's engagement in this case was as follows:—

“ Mr. *Wakefield* will engage to pay the bill drawn by *Pitman* in favour of *Stephen Saunders*.”

By the declaration it appeared, that the plaintiff had commenced an action against *Pitman* upon a bill of exchange, drawn by *Pitman* on *Thomas Michmen*, and payable to the plaintiff's order; that the defendant gave the above engagement in consideration that the plaintiff would cease to prosecute the action; and that the plaintiff did cease accordingly. The defendant pleaded, that his promise was a special promise (b) to answer for the debt of another person, viz. *Pitman*, and that no agreement

tween a bargain and an agreement is unreal, for there is no bargain without an agreement, and, therefore, according to the argument in *Wain v. Warlters*, there is no bargain in writing, unless the writing contains the consideration.

“ If,” said Mr. Justice *Bayley*, *Saunders v. Wakefield*, (see *infra*), “ we were to hold that the consideration might be omitted in the written agreement, we should immediately let in fraud and perjury.” But surely this danger is trifling compared with the nullification of three out of every four of this species of agreements. In America, it seems, the most eminent judges have dissented from the modern rule, and adhere to the old construction by which a promise in writing is held sufficient. (See *Payne v. Wilson*, 1 M. & R. 710, note, (a).)

(a) 4 B. & Ald. 595.

(b) *Abbott*, C. J. is reported to have made the following remarks upon the term “ special promise.” “ At common law no action would lie unless there was some specialty or peculiarity in the promise. It is impossible to conceive how there can be such specialty, unless the consideration for the promise be stated; for it is the consideration which makes it a special promise. The consideration, *therefore*, must have been in the contemplation of the legislature when they used the words special promise. If so, it would follow, that a party is not entitled to recover unless the written agreement contain some specialty, which cannot be unless it contain the consideration.” According to usage, however, *penes arbitrium loquendi*, the word “ special” denotes rather the *form* of the

wherein the consideration for the said special promise was stated or shewn, was in writing. In reply, the plaintiff affirmed that there was an agreement in writing, viz. the above agreement, which was set out in the replication. To this the defendant demurred; and, after a long argument, the Court unanimously gave judgment in favour of the defendant. Thereby supporting the previous decision, and establishing, beyond a question, a necessity for the consideration to be in writing.

14. In *Jenkins v. Reynolds (a)*, the first case in which the Court of Common Pleas adopted these decisions, the guarantie was as follows:—

“To Messrs. *Jenkins and Jones*. Gentlemen, to the amount of 100*l.* be pleased to consider me as security on Mr. *James Cowing and Co.*'s account.”

Signed by the defendant; and held insufficient, because on its face it is doubtful whether it relates to a past (b) or a future account or transaction.

15. It appears then that for a guarantie to be valid, the memorandum of it must express, not only a promise, but also a consideration (c). And this leads to the

promise. A special promise is an *express* promise; and the expression is used antithetically to “implied promise:” and as the law never implies a promise to answer for the debt of another, every such promise is a special promise.

(a) 3 Brod. & Bing. 14.

(b) Supposing it to relate to a past transaction, then there was no consideration; for a past consideration is not a legal consideration.

(c) In *Jackson v. Hudson*, 2 Camp. N.P.C. 447. The defendant was sued as the acceptor of a bill of exchange. It appeared the bill had been previously accepted

by another person, under whose acceptance the defendant's was written thus:—

Accepted, *J. Irving*.

Accepted, *Jos. Hudson*.

For the plaintiff, proof was offered that, having dealings with Irving, he had refused to sell him any more goods, unless the defendant would guarantee the price of them; and in consequence the defendant put his name upon the bill as acceptor; and it was argued that he was to be considered as a joint acceptor, and that not having pleaded in abatement he was liable separately in the present action.

question, What is a sufficient statement of the consideration? Which it seems can be best answered by giving specimens of the guaranties upon which there have been decisions with reference to this question.

Of the Statement of the Consideration.

16. In *Stadt v. Lill* (a) the defendant's guarantie was as follows:—

“ I guarantie the payment of any goods which *J. Stadt* delivers to *J. Nicholls*.”

Lord *Ellenborough* was of opinion, at *Nisi Prius*, that the delivery of the goods to *Nichols* was a consideration sufficiently appearing on the face of the writing; and the rest of the Court were of the same opinion.

17. Upon the following:—“ I hereby guarantie the present amount of Miss *Harriett Moseley*, due to *R. T. Shortridge & Co.*, South Shields, of 112*l.* 4*s.* 4*d.*, and what she may contract from this date to the 30th of September next;” it was held, that the consideration sufficiently appeared on the face of the agreement. The apparent consideration was a further supply of articles on credit (b).

But Lord *Ellenborough* said, “ If you had declared, that in consideration of the plaintiff selling the goods to Irving, the defendant undertook that the bill should be paid, you might have fixed him by this evidence. There cannot be a series of acceptors. The defendant's undertaking is clearly collateral, and ought to have been declared upon as such.” But if the plaintiff had no other evidence to support such a declaration than the defendant's signature upon the bill, or supposed acceptance, I conceive it would not have been sufficient, as such signature expresses neither

a consideration nor a promise: for which reason, indeed, in *Britten v. Webb*, 2 B. & C. 483, et 3 D. & R. 650, where the defendant was sued as an indorser, and was held not liable as such within the custom of merchants, it was also held his indorsement did not support a special count adapted to the supposition of his being a surety: probably this count was drawn in consequence of the suggestion of Lord *Ellenborough* in *Jackson v. Hudson*.

(a) 1 Camp. N. P. C. 242, et 9 East R. 348.

(b) *Russell v. Moseley*, 3 Brod. & Bing. 211. In *Wood v. Benson*,

18. In *Morris v. Stacey*(a), the defendant having offered bills in payment for some goods which he had purchased of the plaintiff for a third person, was requested by the plaintiff to indorse them; this he refused to do, but he said he would give the plaintiff a letter of guarantie which would do as well, and he wrote the following letter:—

“ December 24th. I hereby hand your drafts drawn by Mr. *Wallis*, and accepted by Mr. *Bromley*, and indorsed by *R. Burns*, and should the bills not be honoured when due, I promise to see that they do so.”

And *Gibbs*, C. J. said, “ It is sufficient. It appears on the face of the letter, that in consideration that the plaintiff would take the notes, the defendant would indemnify him. The consideration therefore is apparent.”

19. In *Morley v. Boothby*(b) the guarantie was as under:—

“ Messrs. *Morley & Co.* We hereby promise that your draft on *William Clarke, Son & Co.*, due at Messrs. *Mas-terman's*, at six months, on the 27th of November next, shall be then paid out of money to be received from St. Philip's Church, say amount 174*l.* 13*s.* 5*d.*” And held void.

“ In the present case,” said *Best*, C. J., “ the instrument set out by the plaintiffs in this replication (c) contains

a case which occurred in the Court of Exchequer last Michaelmas Term (1831), the guarantie was as follows:—“ I hereby undertake to pay for the gas that may be consumed in the minor theatre at Manchester, and for the lamps outside, during the time it is occupied by my brother-in-law. And I engage for all the arrears now due.” This guarantie was objected to as wholly invalid, because there is no consideration expressed for the engagement to pay the arrears; but Lord *Lyndhurst*, C. B., and the other Judges in concurrence with

him, thought the promise to pay the arrears was invalid, but that it was also distinct from the other part of the engagement, and that upon this the plaintiff was entitled to recover. The guarantie in this case is very similar to the above in *Russell v. Moseley*.

(a) Holt, N. P. C. 153.

(b) 10 J. B. Moore, 395; S. C. 3 Bing. 107.

(c) The pleadings in this case were the same as in *Saunders v. Wakefield*, (ante, p. 2,) viz. a special plea under the statute, a replication setting out the above

neither an executed nor an executory consideration. It does not appear that the credit which had been previously given to the original debtors was extended in consequence of the guarantie. When the draft, which had been given, became due, the debtors were liable to be sued as well after as before the giving of the guarantie. No benefit or advantage accrued to them from that instrument, nor did the plaintiffs suffer any detriment or inconvenience, in consequence of the execution of it: and although it speaks of money to be received from *St. Philip's Church*, still it does not appear that the defendants had any particular interest in or were to be in any degree affected by such money." Judgment for the defendants.

20. In *Newbury v. Armstrong* (a) the following guarantie was given in evidence:—

"To Mr. *Newbury*. Sir, I, the undersigned, do hereby agree to bind myself to be security to you for Mr. *J. Corcoran*, late in the employment of Mr. *Ransom*, for whatever which in your employ you may intrust him with, to the amount of 50*l.*, in case of default, to make the same good." Signed by the defendant.

Corcoran had failed to account for 34*l.* But it was contended that the action could not be maintained, because the agreement contained no consideration, and also because there was no mutuality expressed in the agreement. But *Tindal*, C. J., said, the agreement need not shew "mutuality," and the learned judge thought it might be collected from the words of the contract that the plaintiff's taking *Corcoran* into his service was the consideration. "If you can by reasonable construction, collect from it the consideration, it is enough. In this case, it rather appears from the words of the contract mentioning *Corcoran* as lately in the employment of another master, that he was not at the time of its date

agreement, and a demurrer, which raised the question whether or not the agreement was sufficient.

59; *S. C.* 1 *Moody & Mal. N.P.C.* 389; 3 *Moore & Payne*, 509; et 6 *Bing.* 34, *S.C.*

(a) 4 *Carrington & Payne N.P.C.*

taken into the plaintiff's service. If so it is clear, that the plaintiff's doing so (taking him) was the consideration of the defendant's promise; and if by fair construction we can, as it were, spell out of the contract that it was so, it is enough." And then alluding to *Wain v. Warlters*, and *Saunders v. Wakefield*, the learned judge said, "those cases had been carried to the extreme edge of the law." A verdict consequently ~~was given~~ for the plaintiff. And upon motion to set it aside, supported by the same objection as that made at the trial, the Chief Justice remarked, that, "the words are all prospective;" and he repeated the above opinion. And Mr. Justice Park said, "The question here is whether the consideration sufficiently appears on this instrument? I think it does; because where the defendant undertakes in respect of one who has *lately* been in the employ of another, for whatever the plaintiff *may* intrust him with, the agreement is plainly prospective, and in consideration of the party's being employed and intrusted."

21. So in *Ryle v. Curtis* (a), upon the following guarantie:—

"I do hereby agree to become security for Mr. R. G. *now* your traveller, in the sum of 500*l.* for all monies which he may receive on your account."

Abbott, C. J. said, "I think it sufficiently appears that the consideration for this guarantie was the *continuance* of the traveller in the service of the plaintiffs." The plaintiffs had declared that in consideration of their continuing R. G. in their employment, the defendant undertook to be answerable for him.

22. In *ex parte Gardom* (b) the guarantie was as follows:—

"We agree and engage to guarantie for what twist *Thomas Tapp* may purchase of you from the 28th ult. to the 1st of January, 1808."

Of which the Lord Chancellor (*Eldon*) is reported to have said, "it is excessively difficult to distinguish it from

(a) 8 Dowling & Ryland, 62.

(b) 15 Ves. 287.

the case of *Wain v. Warlters*, as for the engagement to be answerable for any twist which the petitioners should supply to another person, there is no consideration, unless as it may be proved by parol evidence that they did agree to furnish twist." It may, however, be observed, that evidence to this effect would rather prove *mutuality* of agreement, which is not necessary, than a consideration; and in fact a consideration is expressed, namely, the supply of twist to *Tapp* within a certain period upon credit; and that in terms very similar to those in *Mason v. Pritchard* (a), which were held sufficient.

23. The cases of *Boehm v. Campbell* (b), and *Pace v. Marsh* (c), should be noticed. In the former the guarantie was as follows:—

"Gentlemen,—Our mutual friends, Messrs. *R. J. Sawyer & Co.* having accepted the underwritten bill drawn on them by your firm, I hereby give my guarantie for the due payment of the same, should it be dishonoured by the acceptors." Dated London, 14th August, 1818.

The bill underwritten was a copy of one already accepted, and, for aught that appeared, already remitted to the plaintiffs, and placed by them to the credit of the acceptors.

In the latter it was:—"Mr. *Pace*. Sir, Mr. *Livie* having chartered your ship *Robert*, to bring a cargo of timber from New Brunswick, and the same being landed to the charterer, and he having paid you one half the freight, and given you his acceptance for the remaining half at four months' date, I engage to be accountable to you for the amount of said acceptance, should it not be paid when due."

In both these cases it was urged, that no consideration, or only a past one, appears on the face of the agreement; this was the view taken of them also by *Best*, C. J. who, in the subsequent case of *Morley v. Boothby* (d), said

(a) See *post*.

(c) 1 Bing. 216; S. C. 8 J. B.

(b) J. B. Moore, 15; S. C. 8 Moore, 59.

Taunt. 639.

(d) *Vide antè*, p. 14.

they expressed "a bygone consideration," which is no consideration (a): yet in both the plaintiff obtained a verdict. And, therefore, they present an apparent contradiction to the other cases upon this subject. The contradiction however is not real; for the case of *Pace v. Marsh* was decided chiefly on the ground of its not being distinguishable from *Boehm v. Campbell*; and with respect to the latter case, *Dallas*, C. J., said, it did not require the Court to express any opinion upon the case of *Wain v. Warlters*, for "here the consideration is set out, which it was not in that case;" and the learned judge described it to be, "that the plaintiff *would* take a bill drawn and accepted by *Sawyer & Co.*," which is plainly an executory consideration. So that the true objection to these cases is, not that they deviate from the rule respecting the consideration, but that they rest upon an untenable construction of the agreements.

24. In *Lyon v. Lamb* (b), the defendant was sued as surety for one Anderton. It appeared that Anderton, who was a cotton-weaver, was in the habit of sending his manufactured goods to the defendant for sale as his factor; that the defendant, in April 1806, purchased for him of the plaintiffs a quantity of raw cotton, which the defendant afterwards paid for; that other parcels of cotton were supplied afterwards in the same manner; and all the invoices were made out in the following form:—"Mr. John Anderton (guaranteed by J. Lamb), bought of J. Lyon. To Cotton," &c.; and were sent successively to the defendant. Upon Anderton's ceasing to employ the defendant as a factor, the defendant sent back the next invoice, and gave Anderton for the plaintiff the following note:—"Mr. John Lyon, you will herewith receive back your invoice of nine bags left on Wednesday; as Mr. Anderton does not now send me his goods to sell. I guarantee all he has bought from you before Tuesday; but I will guarantee no further." On behalf of the defendant it was objected that the memorandum did not sufficiently contain the agree-

(a) *Vide antè*, p. 7.

(b) Appendix to Fell on Guaranties.

ment, the consideration not being expressed in it; and the Court were of that opinion, and awarded the *postea* to the defendant.

In this case one of the arguments used in support of the guarantie was, that coupling the invoices with the memorandum, and adding the fact that all the invoices were made out in the same manner, and delivered to the defendant, it must be inferred that the subsequent sales as well as the first were made *upon the request of the defendant*. But the Court said, such an inference did not necessarily follow: and upon the further suggestion, that there was evidence in fact that the defendant had requested the plaintiff to supply the subsequent goods, the Court seemed to be of opinion, that even if the fact were so, it would be of no service to the plaintiff, unless it could be collected from the memorandum coupled with the invoices, the only written documents; which they were of opinion it could not.

The ground of the decision therefore in this case seems to be, that the note expressed a past consideration;—"I guarantee all he *has bought* from you;"—and the evidence that the sales were made upon the request of the defendant was of no avail for two reasons; 1, that it was only testimonial; and 2, supposing it to prove an executory agreement of guarantie, it was contradicted by the written, and therefore weightier, evidence. But, from the recent case of *Payne v. Wilson* (*a*), it appears, that if there had been *written* evidence that the credit given to Anderson was given upon the request of the defendant,—as, had the defendant either made the request in writing or in writing acknowledged having made it,—the guarantie, though expressed as a guarantie for past purchases, would have been sufficient. Thus, in the case alluded to, the memorandum given in evidence was as follows:—"Mr. R. Payne (the plaintiff) *having, at my instance and request*, consented to suspend proceedings against the above-named defendant (one C. Vaux), upon the cognovit

(*a*) 1 Mann. & Ryl. 708. S. C. 7 B. & C. 423.

signed by him, &c., I do hereby, in consideration thereof, personally undertake and promise to pay to the plaintiff the sum of 30*l.* on account of the said debt, on the 1st day of April now next, and the further sum of 53*l.* 3*s.* within four months next ensuing the 1st day of April." Here, the plaintiff's *having consented* to suspend proceedings is the consideration, and according to the expression it is a past one; but the consent, it also appears, was given at the request of the defendant; and the request, promise, and consideration are only one agreement: and therefore the statement of the declaration, that the defendant promised to pay 30*l.* on account of the debt, in consideration that the plaintiff *would consent* to suspend proceedings, was considered as proved by the above memorandum.

25. In *Stead v. Liddard* (a), an action upon a guarantie; the guarantie was made out as follows:—the defendant's son was residing at *Drontheim*, and purchased on account of the plaintiff a quantity of stock-fish and oil, which were paid for by bills drawn by the plaintiff and accepted by the defendant's son. The plaintiff engaged defendant's son to dispose of the fish and oil, and he was to be interested in one-third, as a compensation for his trouble. This agreement was completed by the plaintiff's writing to the defendant's son a letter; of which it is unnecessary here to give a copy. A copy of the letter was kept by the plaintiff, under which the defendant's son wrote as follows:—"Above is a copy of a letter handed to me this day by Mr. Stead, and (I) agree to its contents, errors excepted, having accepted the bills (b) in question to be handed to Sir P. Pole & Co." And on the back of it the defendant wrote the following:—"Mr. D. Stead. Sir, I hereby agree to pay or hand over to you or Sir P. Pole & Co., immediately on receipt thereof, all such sums of money and bills of exchange as may come to my hands from

(a) 8 J. B. Moore, 2. S. C. those drawn by the plaintiff to pay
1 Bing. 196. for the purchase.

(b) The bills alluded to were

or be remitted to me by my son, *L. A. Liddard*, agreeably to the foregoing copy of a letter and agreement or undertaking; such bills and monies to be appropriated to the payment of the acceptances mentioned in the said copy letter. And in consideration of your having paid for the whole cost of fish and oil as therein stated, and having given to said *L. A. Liddard* an interest in such shipment to the extent of one-third, I hereby engage to be responsible and accountable to you for the proceeds that may be procured by him for the same, and for the due application and remittance by said *L. A. Liddard*, in conformity with said copy letter, of all monies and bills which he may receive, or that may be paid to his order on account of said fish and oil, and the balance of bills given to *Jensen*." (Signed by the defendant.) Two objections were made to this agreement: 1. That the paper containing it had only one stamp, and that it was necessary the guarantie should be stamped separately. 2. That the consideration stated on the face of it was a past one, which, without a previous request, was insufficient. But the Court thought one stamp sufficient, because there was only one transaction; and that there was a sufficient memorandum of the consideration; as, taking it altogether, there was evidence of a request; and as the defendant undertook to pay the plaintiff all sums which *might come* to him from his son on account of the cargo in question, the consideration expressed was prospective and not a past one.

26. In *Coe v. Duffield*^(a) the action was brought upon a guarantie. The plaintiff first gave in evidence the following letter of the defendant:—"Sir, I undertake to guarantee to you the payment of 100*l.* now due to the estate of Mr. *William Goodwin*, currier, a bankrupt, from Mr. *Henry Wilson*, shoemaker, *King Street*, Cambridge, for articles which have been delivered to him for the use of his trade or business as a shoemaker; so that this my guarantie shall not be put in force against me for that

(a) 7 J. B. Moore, 252.

sum for two whole years from the date hereof. (April 3d, 1820.)" The plaintiffs then proved that they were the assignees of Goodwin; but it was objected that they were not entitled to recover, because no consideration was expressed on the face of the instrument. To meet this objection the plaintiffs gave in evidence two letters written by the defendant, the first dated the 29th March 1820, and addressed to the plaintiff *Coe*, in which the defendant stated, that feeling himself interested for *Wilson*, he could not refrain from giving his security, if the plaintiffs would agree to his terms, which were to allow him two years to pay the whole sum by instalments, and accept his guarantie to see it paid in that time. The second letter was dated the 20th November 1821, in which the defendant recognized the guarantie, and requested the plaintiffs to indulge *Wilson* with another year, and stated that he was fully aware, that, on the nonpayment, the debt fell on him; and that in case the indulgence were granted to *Wilson*, the guarantie should either be renewed, or he would give the plaintiffs a promissory note to become payable, with interest, at Lady-day 1823. And it was submitted that this correspondence sufficiently proved that forbearance to *Wilson* was the consideration for the defendant's promise: and the Judge at *Nisi Prius*, and the Court afterwards, were of this opinion.

27. If a defendant pays money into Court in an action upon a guarantie, the guarantie is held to be admitted, and proof of its being in writing is unnecessary (a).

Miscellaneous Points.

28. It may be of use to notice briefly a few miscellaneous points regarding the sufficiency of the note of the

(a) *Middleton v. Brewer, Peake*, where the same point was ruled by
20. See also *Kay v. Groves*, 4 *Tindal, C. J.*
Carrington & Payne, N. P. C. 72,

agreement, some of which have been determined under other clauses of the statute (a).

All the authorities concur, that the form of the agreement is immaterial. A memorandum, note, letter, or any other kind of writing containing the terms of the agreement, is sufficient; or even if it does not contain the terms, but refers to an unsigned paper, and alleges that that does, it and the paper together are sufficient. But if neither the letter in which an agreement is mentioned, nor a writing clearly referred to by it, specify the terms, the statute is not satisfied: consequently a general acknowledgment to the effect that there is an agreement, is not sufficient.

29. It has been remarked, that the Courts, in their exposition of the statute, have regarded the writing rather as a necessary evidence of the contract, than as a constituent part of it. Conformably with this view, it is not necessary that the agreement should in the first instance be reduced to writing. In the case of a letter, also, it is immaterial whether or not it is addressed with the view to authenticate or show the agreement. To whom addressed is also immaterial: a letter to the writer's own agent, or the agent of the other party, or to a stranger, is sufficient. In *Longfellow v. Williams* (b), the defendant's son being indebted to the plaintiff £1400 on a judgment, the defendant promised the plaintiff to pay him the allowance which he had theretofore made his son, viz. £200 a year for three years after his son's death, should he so long survive his son. This promise was originally verbal; but the defendant, after his son's death, had remitted the usual quarterly sum to the friend who had been in the habit of paying the allowance; and in the letter containing

(a) Full information on these points will be found in the Treatises on Evidence, by Mr. Phillips and Mr. Starkie. The Treatise on the Law of Vendors and Purcha-

sers, by Sir E. B. Sugden, also contains a valuable exposition of the authorities on this subject.

(b) Peake's Additional Cases, 225.

the remittance the defendant desired his friend to pay it to the plaintiff, as his son was no more; and he stated the particulars of his promise to the plaintiff, and that he had saved his son from a gaol. *Lawrence, J.*, thought this letter was a sufficient memorandum of the agreement. Verdict for the plaintiff.

30. In *Bateman v. Phillips (a)*, a letter of guarant^{ie} addressed to the attorney of the creditor, and in which neither the name of the creditor nor the amount of the debt was mentioned, was held sufficient. In this case it appeared that the plaintiff was about to sue one Williams for a debt of £80, and had employed Mr. Gwyn, an attorney, for that purpose; in consequence of which the defendant addressed to Mr. Gwyn the following letter:—

“ Sir,—The bearer, David Williams, has a sum of money to receive from a client of mine some day next week, and I trust you will give him indulgence till that day, when I undertake to see you paid.”

Mr. Gwyn was called as a witness, and proved that the letter was addressed to him as the attorney of the plaintiff, and that Williams brought it to him. It was objected that the letter did not mention either the name of the plaintiff or the amount of the debt, and consequently that it might as well apply to any other debt due to any other person. *Wood, B.* overruled the objection, and the Court refused to set aside the verdict obtained by the plaintiff.

31. An agreement once in writing, but afterwards revoked, cannot be revived by parol.

32. The agreement must be signed. The signature of him who is to be charged is sufficient, without that of the other party. A signature in olograph (*b*), as I *A. B. &c.* in the hand-writing of *A. B.*, is sufficient. The signature must express the name of the party; a descriptive signature, as the signature of “Your affectionate mother,” in

(a) 15 East's, R. 270. (b) *Knight v. Crockford*, 1 Esp. N. P. C. 190.

a letter addressed by a mother to her son, is not sufficient (a).

33. An agreement signed by an agent is sufficient. But the agent must be some third person. An agreement signed by one of the parties, or by the clerk of one of the parties as the agent of the other party, is not sufficient. Thus, in *Dixon v. Bromfield* (b), the action was brought upon a guarantie in a note addressed to the plaintiff, which stated that Mr. Bromfield called to say he would be responsible for goods delivered to Mr. H. The note was written by the clerk of the plaintiff, in the plaintiff's shop, but in the defendant's presence, and there was evidence that the defendant assented to it, though he did not sign it: but the plaintiff was nonsuited.

34. A letter amounting merely to an offer to guarantee, is not sufficient, because an offer until accepted is not binding as an agreement. Thus, in *M'Iver v. Richardson* (c), the action was brought upon the following letter:—

“Messrs. M'Iver & Co.—As I understand that Messrs. Anderson & Co. have given you an order for rigging, &c. which will amount to about 4000*l.*, I can assure you, from what I know of D. A.'s honor and probity you will be perfectly safe in crediting them to that amount; *indeed I have no objection to guarantee you against any loss from giving them this credit.*”

The letter was given by the defendant to Anderson & Co., and by them to the plaintiff; but no communication respecting it was made to the defendant until the failure of Anderson & Co. And the Court thought, that without notice from the plaintiffs that they meant to accept it, or some proof that the defendants had subsequently consented to its being conclusive as a guarantie, it was not binding upon him; and therefore there was judgment of nonsuit.

(a) *Selby v. Selby*, 3 Mer. 2.

(c) 1 M. & S. 557.

(b) 2 Chitty's R. 205.

35. Upon the authority of the last case *Holroyd, J.*, thought the plaintiff not entitled to recover upon evidence of a guarantie, consisting merely of the following letter:—

“Sir,—*I have no objection to guarantee the payment of rent, as far as that of each quarter, during Mr. T. Want's continuance in possession; but you must see that no arrears of rent accrue*” (a).

36. In *Gaunt v. Hill* (b) the plaintiff gave in evidence the following letter, upon which he sought to recover, as a guarantie:—

“Sir,—That it may not be said that I have made no effort to save my brother from prison, I wish to know if you will give him a full discharge if I will pay one moiety of his debt. I have specified what I will pay, and no more: if you will accept this, call upon me to-morrow morning.”

It was not dated, but it had the post-mark of the 28th of March; and to show that the offer contained in it was accepted, the plaintiff read a letter sent by himself to the defendant on the 4th of April, in which he remonstrated with the defendant for not paying one moiety. But Lord *Ellenborough* thought this not sufficient, and said, that the defendant's letter was a mere proposition to pay a moiety, reserving a power to do anything or nothing, as he pleased, the next day, and that at all events it would be necessary to show that the plaintiff had acceded to the proposal in writing.

37. It has already been stated, that a memorandum of an agreement of guarantie signed by an agent is sufficient. It seems, that if a person signs a guarantie as an agent, intending not to bind himself, but only his principal, he should sign the name of his principal; and if he signs his own name, he will in general be personally liable. Thus,

(a) *Symmons v. Want*, 2 Stark. N. P. C. 371. (b) 1 Stark. N. P. C. 10.

in an action (a) upon the following guarantie given by the defendant, the English agent of Nissen & Co.:—

“Gentlemen,—On behalf of Nissen & Co. of Riga, I hereby guarantee that the shipment of hemp in the *Caroline* will be found to be in conformity with the revenue laws of Great Britain, so that no impediment shall arise upon the importation thereof, or that on default thereof the consequence shall rest with Nissen & Co.” Signed by the defendant in his own name:—

It was contended, that the defendant had engaged for Nissen & Co. and not for himself; but Lord *Ellenborough* said, “I think the guarantie is personally binding upon the defendant, since Nissen & Co. were liable to answer for their neglect in sending the goods in an improper ship without any guarantie” (b). So too in *Iveson v. Conington* (c), the defendant, who was the attorney of one W. L. in a cause in which W. L. was plaintiff, did personally undertake, consent, and agree, (signing his own name to the agreement,) that a certain act should be done by his client; and it was held he had made himself personally liable. So too in *Burrell v. Jones* (d), the defendants, solicitors of the assignees of a bankrupt tenant, upon whose lands a distress had been put, gave the landlord the following written undertaking:—“We, as solicitors to the assignees, undertake to pay to the landlord his rent, provided it do not exceed the value of the effects distrained;” and they were held liable, though on their behalf it was contended that they contracted merely on the part of the assignees. In *Appleton v. Binks* (e) also,

(a) *Redhead v. Cator*, 1 Stark. N.P.C. 14.

(b) Besides, it could not be the guarantie of Nissen & Co., because they were the principals; and a man cannot be his own surety. And the expression, “I hereby guarantee” will scarcely bear any

other interpretation, than that the defendant meant to be a surety.

(c) 1 B. & C. 10; S. C. 2 Dowling & Ryland, 307.

(d) 3 B. & Ald. 47. See also *Kennedy v. Gonoveia*, 3 Dowling & Ryland, 503.

(e) 5 East's R. 147.

the defendant, by the name and description of T. Binks, of &c. "for and on the part and behalf of the Right Hon. Lord Viscount Rokeby," covenanted that Lord Rokeby should pay to the plaintiff the purchase money of an estate, and was held liable on the covenant. In each of these cases persons who were agents, and apparently intended only to bind their principals, made themselves liable; which may happen also to an agent in making for his principal the contract of surety, although in like manner his intention is, that his principal should be the surety.

It may be convenient to notice here a few of these general points in the law of agency which are apt to arise upon guaranties made through the medium of an agent.

1. *Of the Persons competent to be Agents.*

38. An agent, as such, is considered a mere instrument to execute the will and power of another. Therefore persons incapacitated to contract on their own account are competent to be agents (a). Infants (b), married women, and persons excommunicated, may be agents.

2. *Of the Authorization of Agents.*

39. The law prescribes no rule for the authorization of agents, excepting that to contract by *deed*, they should be authorized by deed. In other cases no express authorization is necessary. An implied authority, or one inferred from circumstances, is sufficient; and the act for which the agent has only an implied authority, is as binding as if the principal had expressly appointed him to do it. Thus, in *Watkins v. Vince* (c), which was an action upon a guarantie, it appeared that the guarantie was in the handwriting of the defendant's son, who was a minor. It was proved that the youth had in three or four instances before signed for his father; and this Lord *Ellenborough*, C. J., thought sufficient *prima facie* evidence of the son's being authorized, and the plaintiff had a verdict.

(a) *Combe's case*, 9 Co. 75.

(c) 2 Stark. N.P.C. 368.

(b) See *infra*, *Watkins v. Vince*.

40. The ratification of an act is equivalent to a prior authority to do it. Therefore a guarantie by an agent, having been ratified by his principal, was held binding upon the latter, although it was given without any authority (a).

“In my opinion,” said *Best*, C. J., in another case (b), “the subsequent sanction of a contract signed by an agent takes it out of the operation of the statute more satisfactorily than any authority given before hand. Where the authority is given before hand, the party must trust to his agent; if it be given subsequently to the contract, the party knows that all has been done according to his wishes.”

Of Guaranties given by or to Partners.

41. The cases belonging to this title are within the general rules of the law of partnerships. In virtue of the relation of partner, and without any express authority, the act of one partner is binding upon his co-partners, if it is within the scope and custom of the partnership business. But it is not considered within the scope of a common partnership for the firm to make itself responsible for other parties, and, therefore, the guarantie of one partner in the name of his firm does not bind the firm unless the other partners have either authorized or ratified it. Thus in *Duncan v. Lowndes* and *Bateson* (c), which was an action upon a guarantie given by the defendant *Lowndes* in the name of himself and the other defendant, it appeared that the two were in partnership together as merchants. On their behalf it was insisted, that some direct evidence that the defendant *Bateson* had authorized the other defendant to enter into this undertaking was necessary; but it was replied that this was to be inferred from the relation

(a) *Bailey v. Culverwell*, 8 Barn. & Cres. 448; 2 Manning & Ryland, 564.

(b) *Maclean v. Dunn*, 4 Bing. 727; S. C. 1 Moore & Payne, 761.

(c) 3 Camp. N. P. C. 477.

subsisting between the defendants. Upon which, Lord *Ellenborough*, C. J. said, "As it is not usual for merchants in the common course of business to give collateral engagements of this sort, I think you must prove that *Loundes* had authority from *Bateson* to sign the partnership firm to the guarantie in question. It is not incidental to the general power of a partner to bind his copartners by such an instrument."

In the same case one question was, whether proof that *Bateson* had subsequently approved the guarantie would be sufficient? And Lord *Ellenborough* said, "All that the plaintiff has to prove is *Loundes's* authority to sign the partnership firm to the guarantie. When that is established, there is a very good note in writing to bind both partners. For this purpose, I think a subsequent recognition by *Bateson* may be given in evidence, as well as a prior command; and either the one or the other may be shown by parol as well as by a written document. Proof of a previous course of dealing in which such guaranties were given, and to which both partners were privy, I think, would be sufficient."

42. This point was decided also in *Crawford v. Stirling* (a). There the defendant pleaded a set-off which he claimed under a guarantie given by *Mitchell*, one of the partners in the plaintiff's firm; and the set-off (b) was disallowed; "for," said Lord *Ellenborough*, "a guarantie given by one partner in the partnership name, unless it was in the regular line of business, could not bind the other partners; but if they afterwards adopted it and acted upon it, it should bind them."

In *ex parte Gardom* (c) one objection to the proof of a guarantie given in the name of a firm was, that the partnership was not bound by the signature of one partner; but

(a) 4 Esp. N.P.C. 207.

(b) It was ruled in this case that a demand under a guarantie could

not be set off, it being not a debt but unliquidated damages.

(c) 15 Ves. 286.

this objection was relinquished, and, the Lord Chancellor said, properly so, for the partner appeared to have had authority.

43. The guarantie of one partner will bind the firm, also if it was given in the course of a partnership transaction, or under circumstances from which it may be inferred, either that the other partners were actually cognizant of it, or would have been so, had they paid the usual attention to the partnership business.

In *Sandilands v. Marsh* (a) it appeared that the defendant and Creed had been in partnership as navy agents. The proper business of navy agents is to receive money from the navy board, and dividends from the public funds. The firm had been employed in business of this kind by Captain Howden. Creed, in a letter signed with his own name only, proposed to Captain Howden to purchase an annuity for him, and to guarantee it for a commission of 5 per cent. The proposal was accepted, and Captain Howden sent a power of attorney, not to Creed alone, but to Marsh and Creed jointly, to sell stock to pay the price of the annuity. The stock was sold under the power, and the sale was entered in the partnership books, so that the transaction, if not actually known to the defendant, might have been. On the death of Captain Howden the plaintiffs, his executors, applied to the firm respecting the annuity; and were answered, in a letter signed Marsh and Creed, that it was guaranteed by the house on a commission. The commission in fact had never been charged; but there were several items in the books of the firm respecting the sale of the stock and receipt of the annuity. Upon these facts it was objected that the guarantie by Creed could not bind Marsh his partner. But *Abbott, C. J.* left it to the jury to say, whether, under the circumstances, Marsh was cognizant of the transaction as to the purchase of the annuity, telling them, that in that case he thought the defendant

(a) 2 Barn. & Ald. 673.

was liable, although he might be ignorant of the fact of the guarantie itself. The jury found this in the affirmative, and the Court refused to set aside the verdict.

44. It is simply a question of pleading, and, therefore, will be only cursorily noticed here, by whom an action should be brought upon a guarantie given to one of several partners. It has been seen (a) that upon a guarantie given to an agent, intended for the benefit of his principal, an action in the name of his principal is proper. In like manner, upon a guarantie given to one partner in respect of a debt of the firm, the action should be in the name of all the partners. Thus, in *Garrett v. Handley* (b), the plaintiff declared, that, in consideration that he would advance to one *T. Gibbons* the sum of 550*l.*, the defendant promised provision should be made for repaying him. The guarantie given in evidence was as follows:—

“Sir,” (addressed to the plaintiff), “I understand from *Mr. Gibbons* that you have had the goodness to consent to advance 550*l.*, to discharge a like sum for which he became security for his cousin *Mr. T. Gibbons*, upon my assurance, which I hereby give, that provision shall be made for repaying you this sum under the arrangement now going on for the settlement of *Mr. Gibbons*’ concerns.”

It also appeared that the plaintiff was a partner in the banking firm of Bodenham, Phillips and Garrett; that the money was advanced by the firm, and that the firm, in their books, had made *Gibbons* their debtor. But the declaration described the consideration as moving from the plaintiff; and it was held that the evidence did not support the declaration, and the plaintiff was nonsuited.

Afterwards an action was brought upon the same guarantie by Garrett and Bodenham (c) as the surviving partners. They obtained a verdict; and upon a

(a) *Bateman v. Phillips*, *antè*, 23.

(c) 7 Dowl. & Ryl. 144; *S. C.*

(b) 5 Dowl. & Ryl. 319; *S. C.* 4 B. & C. 664.

3 B. & C. 462.

motion to enter a nonsuit, *Abbott*, C. J. said, "we have perused the correspondence in this case, and we think it sufficiently appears that the guarantie was intended for the benefit of the firm, and not of *John Garrett* alone. That being so, we are of opinion that the action was properly brought in the name of the parties for whose benefit the contract was made.

According to the report of this case in *Carrington and Payne's Nisi Prius Cases* (a) the learned judge at the first trial thought there was another ground of nonsuit. "The plaintiff," said *Abbott*, C. J. "must give some evidence that no provision was made for the repayment, for this was not a promise by the defendant to pay, but only to make provision for repayment; *non constat* but he did so." The Attorney General said, "it was impossible for the plaintiff to procure such evidence." *Abbott*, C. J. replied, "I know you need not give strong proof, but some is necessary. As that you asked what he had done; and his answer that he had not made provision; or something of that sort. If no such evidence is given, the plaintiff must be called" (a).

45. In *Walton*, assig. of *J. N. & M. W. D. v. Dodson* (b), bankrupts, the action was brought upon two guaranties, and the declaration stated the defendant's promise to be to both the bankrupts; one of the guaranties, it appeared, was addressed to *J. N.* only. *Gaselee*, J. inquired if the bankrupts were in business together, and being answered that they were, and that *J. N.* did not carry on any separate concern, the learned judge said, "I think it is sufficient." The other guarantie had no address at all; and the learned judge decided, that such a guarantie would

(a) *Garrett v. Handley*, 1 C. & P. 217. It is to be observed that this was not the ground on which the nonsuit actually proceeded; and I think it would not have been

a sound ground of nonsuit. See 1 *Carrington & Payne*, N. P. C. 483.

(b) 3 *Carrington & Payne*, N. P. C. 162.

enure to the benefit of those to whom, or for whose use, it was delivered (a).

(a) In *Lawrason v. Mason*, 3 Cranch's R. 492, (a case in error from the Circuit Court of the district of Columbia to the Supreme Court of the United States,) the action was brought upon a letter addressed by the defendants below to Mr. James M'Pherson, and by M'Pherson given to the plaintiffs, to induce them to give him credit. The letter was as follows:—

" Alexandria, 28 Nov. 1800.
Mr. James M'Pherson, Dear Sir,
We will become your security for hundred and thirty barrels of corn, payable in twelve months." Signed by the defendants.

The declaration stated (in substance) that the plaintiff, relying on the promise of the defendants, sold and delivered the corn in question to M'Pherson, who never paid for it, of which the defendants had notice; *whereby the defendants became liable and in consideration thereof promised to pay*. The evidence was, that the agent of the plaintiff sold the corn in question on condition of M'Pherson's giving security, which he did by sending the agent the above letter which he had received from the defendants. Before the corn was delivered, the plaintiffs called on the defendants and asked them if they were content to be M'Pherson's security, and after some hesitation one of them said, "*he must be so as he had promised,*" or, "as his word was out, he would;" or words to

that effect. Upon demurrer to this evidence the Circuit Court gave judgment for the plaintiffs, and the Court above confirmed the judgment; upon the latter occasion *Marshall*, C. J. delivered the opinion of the Court to the following effect:—

" This action was grounded upon a note in writing, which was certainly intended by the defendants to give a credit to M'Pherson. They are bound by every principle of moral rectitude and good faith to fulfil those expectations which they thus raised, and which induced the plaintiff to part with his property. The evidence was clear that the credit was given upon the faith of the letter. Unless, therefore, there is some plain and positive rule of law against it, the action ought to be supported. In the case cited from *Espinasse (Jordan v. Jordan, Espinasse, N. P. C. 105,*) the rule is laid down too broadly. If compared with analogous cases, it will be found to be considerably modified. Thus if money be delivered by *A.* to *B.*, to be paid over to *C.*, although no promise is made by *B.* to *C.* yet *C.* may recover the money from *B.* by an action of assumpsit. If it be said that in such a case the law raises the facts, and if the facts do not imply an assumpsit, no action will lie, it may be answered, that in the present case *there is an actual assumpsit to all the world, and*

46. The stamp act, 55 Geo. 3, c. 184, which imposes a duty on every agreement, or the memoranda and minutes of every agreement, the matter whereof is of the value of 20*l.* or upwards, contains also an exception in favour of

any person who trusts in consequence of that promise has a right of action." The mercantile world, probably, would maintain this judgment to be proper, yet I cannot help thinking, that in the English Courts the case would have been decided differently. For, 1. "We will become your security," is an expression which, of itself, rather imports a willingness to engage than an absolute engagement; and being addressed to M'Pherson, is a circumstance in corroboration of this construction. Assuming, therefore, the insufficiency of the letter, the case fails, because the other evidence which went to the extent of proving a promise to the plaintiffs was merely testimonial. 2. It rather appears that a Court of Equity is the proper court for a case of this kind, viewing the engagement "as an assumpsit to all the world" through the medium of M'Pherson. Properly speaking, the assumpsit was, if to any one, to M'Pherson. In *Tomlinson v. Gill*, Ambler, 330, the defendant having promised a widow to supply the deficiency of her husband's assets for the payment of debts, Lord *Hurdwicke* thought the engagement could only be made good in equity, for that it was not made to the creditors. In *Gregory v. Williams*, 3 Mer. 582, also, where the defendant promised Parker, the

tenant of the plaintiff, to pay the plaintiff the rent due to him as Parker's landlord, and one objection to the suit was, that the parties ought to have gone to law and to have recovered as upon an undertaking in writing to pay the debt of another person, the Master of the Rolls said it might be a doubt whether the plaintiff could have recovered at law upon this agreement, for the engagement is not made directly to Gregory the landlord. 3. The remark of Mr. Justice *Gaselee*, that the guarantie referred to in the text would enure to the benefit of those to whom it was delivered, scarcely supports the American decision, since it was made with reference to a guarantie not addressed at all; and which also, in its terms, was a complete engagement. 4. The counsel for the plaintiff in the American case evidently produced a considerable impression by comparing the defendant's letter to a *letter of credit*. But if money is advanced upon a letter of credit, the credit is given not to the bearer, who is the recipient of the money, but to the correspondent: it is money paid at the request and to the use of the correspondent; who, therefore, is not "a security" (surety) as the defendants imported to be, but solely debtor.

agreements "for or relating to the sale of any goods, wares, or merchandise." In both provisions, agreements of guarantie are included. Whenever the principal agreement is exempt, in virtue of its being for or relating to the sale of goods, the memorandum of guarantie is exempt also (a). In other cases agreements of guarantie are liable to the stamp duty.

CHAPTER III.

OF THE INTERPRETATION OF THE WORDS "SPECIAL PROMISE (b) TO ANSWER FOR THE DEBT, DEFAULT, OR MISCARRIAGE OF ANOTHER PERSON," AND WHAT CASES ARE, OR NOT, INCLUDED IN THEM.

47. A guarantie being essentially a promise to answer for the debt of another person, guaranties generally are within these words of the statute; and it has often been supposed that only guaranties are within them.

Thus, in *Fish v. Hutchinson* (c), which was the common case of a promise by A. to pay the debt of B., in consideration of forbearance, the Court said, "This case is very clearly within the statute. For here is the debt of another person still subsisting, and a promise to pay it," (which was equivalent to saying this is a case of a guarantie, and therefore it is within the statute.) "It is not like the case of *Read v. Nash*. In that case there was no debt in another, it being an action of battery, and it could not be known before trial whether the plaintiff would recover damages or not;" (which also was equivalent to saying that was not a case of a guarantie, and therefore the statute did not apply to it.)

48. The case of *Read v. Nash* (d) was as follows:—

(a) *Warrington v. Furber*, 8
East's R. 242; *Watkins v. Vince*,
2 Stark. N. P. C. 368.

(b) *Ante*, p. 4.
(c) 2 Wils. 94.
(d) 1 Wils. 305.

Tuack, a person deceased, to whom the plaintiffs were executors, had brought an action against one *Johnson* for an assault and battery, and when it was called on for trial, another person, since deceased, to whom the defendant was executor, promised verbally to pay *Tuack* fifty pounds and the costs, if he would withdraw the record and proceed no further. The record was withdrawn, and no further proceedings were taken. In the present action upon this promise, the defendant pleaded the Statute of Frauds, and that there was no agreement in writing. To which the plaintiff demurred. The single question, therefore, as *Lee*, C. J. observed, was, "whether this promise, which is confessed by the demurrer (*a*) not to have been in writing, is within the Statute of Frauds; that is to say, whether it be a promise to answer for the debt, default or miscarriage of another." And the learned judge said, "We are all of opinion that it is not; but that it is an original promise sufficient to found an assumpsit on against *Nash*, and is a lien upon *Nash*, and him only. *Johnson* was not a debtor. The cause was not tried. He did not appear to be guilty of any default or miscarriage. There might have been a verdict for him, if the cause had been tried, for any thing we can tell. He never was liable to the particular debt, damages and costs. The true difference is between an original promise and a collateral promise. The first is out of the statute; the latter is not, when it is to pay the debt of another already contracted."

49. In *Kirkham v. Martyr* (*b*), *Martyr* junior, the defendant's son, had taken the plaintiff's horse without leave, and killed it by over-riding. And the defendant, in consideration that the plaintiff would not bring an action for this injury, promised verbally to pay him a sum of money. *Abbott*, C. J., at the trial, thinking this promise an undertaking to answer "for the default or miscarriage of ano-

(*a*) To demur is an admission of the facts stated by the adverse party.

(*b*) 2 B. & A. 613.

ther," and that, therefore, it should have been in writing, nonsuited the plaintiff, and the Court refused to set aside the nonsuit. Upon the motion for this purpose the counsel urged the case of *Read v. Nash* as one which was analogous to the present, and decisive that the verbal promise of the defendant was sufficient. But *Abbott, C. J.*, said, "This case is clearly within the mischief intended to be remedied by the Statute of Frauds; that mischief being the frequent fraudulent practices which were too commonly endeavoured to be upheld by perjury; and if it be within the mischief, I think the words of the statute are sufficiently large to comprehend the case. The words are these; "No action shall be brought to charge a defendant upon any special promise to answer for the debt, default or miscarriage of another person." Now the word "miscarriage" has not the same meaning as the word "debt" or "default;" it seems to me to comprehend that species of wrongful act, for the consequences of which the law would make the party civilly responsible. The wrongful riding the horse of another, without his leave and license, and thereby causing its death, is clearly an act for which the party is responsible in damages; and, therefore, in my judgment, falls within the meaning of the word miscarriage. The case of *Read v. Nash* is very distinguishable from this: the promise there was to pay a sum of money as an inducement to withdraw a record in an action of assault brought against a third person. It did not appear that the defendant in that action had ever committed the assault, or that he had ever been liable in damages; and the case was expressly decided on the ground that it was an original and not a collateral promise. Here the son had rendered himself liable by his wrongful act, and the promise was expressly made in consideration of the plaintiff's forbearing to sue the son. I, therefore, think the nonsuit was right" (a).

(a) The other judges concurred, and delivered similar judgments.

50. The similarity of the facts in the two last cases, (*Read v. Nash* and *Kirkham v. Martyr*), is such, that the learned editors of Saunders's Reports, (one of whom is now upon the bench (a)) have argued, from the opposition of the judgments, that the latter overrules the former—an opinion to which I assent, under, however, a qualification. In both cases an injury had been committed, the appropriate remedy for which was an action *ex delicto*; in both a third person promised a specific compensation; the consideration for the promise in both was similar; in neither does it appear that the alleged wrong-doer confessed the wrongful act; in neither was he a party to the promise, and, therefore, in both, the promise of the defendant was an original promise:—But still, it should be recollected, that *Abbott*, C. J. said the two cases were very distinguishable; and if the distinction in the learned judge's view was, that in the latter case the promise was a collateral one, then the latter judgment cannot be considered as overruling the former, because in the former case the Court regarded the promise as an original one (b). And that this was the distinction seems probable, from the remark, that the case of *Read v. Nash* was "decided expressly as an original promise, but here the son had rendered himself liable." In the reported judgments of the other judges there is not equal evidence of their having considered the defendant's promise a collateral one; but at the same time there is no evidence to the contrary; and upon such a point the Court was not likely to differ. "I am also of opinion," said Mr. Justice Holroyd, "that the nonsuit in this case was right. I think the term *miscarriage* is more properly applicable to a ground of action founded upon a tort than to one founded upon a contract: for in the latter case the ground of action is, that the party has not performed what he agreed

(a) Mr. Justice *Patteson*.

(b) Decisions, although different, obviously are not antinomous,

when there is such a distinction as this in the premises under adjudication.

to perform, not that he has misconducted himself in some matter for which by law he is liable. And I think that both the words *miscarriage* and default apply to a promise to answer for another with respect to the nonperformance of a duty, though not founded upon a contract. This case is certainly within the mischief contemplated by the legislature, and it appears to me to be within the plain intelligible import of the words of the act of parliament." Mr. Justice Best also remarked that there was "nothing to restrain these words *default* or *miscarriage*, and it appears to me that each of them is large enough to comprehend this case."

51. Upon the effect of the decision in this case with relation to the question, whether any other than cases of guarantie are within the statute, it may be observed,

1. That a contract to answer for the *delict* or *tort* of another may, like a contract to answer for the *debt* of another, be a contract of surety (a collateral contract) or not, according to the circumstances. For instance, if, in the case of *Read v. Nash*, the promise, instead of being a promise to pay a specific sum of money to stay proceedings, had been to pay such damages as might be recovered against Johnson, the alleged wrong-doer, or if Johnson had himself acceded to the compromise, and made the same promise, the promise would have been one of surety, although its subject was the delict, tort, or miscarriage of another.
2. Supposing it to have been intended that the statute should include *all* contracts of surety, as well those which relate to delicts as those which relate to debts, the words "default or miscarriage," or others equivalent to them, and significant of the class of acts technically denominated *torts*, were necessary, as without such words only guaranties for debts would have been within the statute.
3. It cannot justly be inferred from the decision of *Kirkham v. Martyr*, that any other cases are within the statute than cases of collateral promises, because, as I have already observed, the Court seems to have regarded that

as a case of a collateral promise: and although some of the remarks made by the Court might possibly serve as arguments for the extension of the statute to the case of original promises, yet, in that point of view, they are scarcely of judicial authority, for two reasons:—*First*, That they were not made with a view to extend the statute to a case of an original promise; and, *secondly*, That there are cases in which it is expressly said that the statute does not apply to original promises. 5. If after all an antinomy is conceived to exist in the cases of *Read v. Nash* and *Kirkham v. Martyr*, it consists merely in THIS, that in the one facts were considered as constituting an original promise, which in the other, though essentially the same, were considered as constituting a collateral promise.

52. In the case of *Buckmyr v. Darnell* (a), the promise was, that if the plaintiff would deliver his horse to J. English, English should redeliver it safe to the plaintiff: and it was decided to be within the statute. For, says Salkeld, in his summary of the reasoning of the Court, "Where the undertaker comes in aid only to procure a credit to the party, there is a remedy against both, and both are answerable according to their distinct engagements (b); but where the whole credit is given to the undertaker, so that the other party is but as his servant, and there is no remedy against him, this is not a collateral undertaking.

(a) 1 Salkeld, 27; 6 Mod. 248; 2 Lord Raym. 1085.

(b) This expression accurately accords with the nature of the contract of surety;—it is a contract for the constitution of which there must be two *engagements*. For instance, if *A.*, the friend of *B.*, under the impression that *B.* has committed a tort and is liable to pay damages, promises to pay the injured party a sum of money in

compensation, *A.*'s is not a contract of surety, unless *B.* is himself under a corresponding engagement. One consequence of a payment by a surety is, that he is entitled to recover the amount from his principal; but if *A.* pays that which *B.* had never himself *engaged* to pay, either expressly or impliedly, it is clear that *A.* could not recover the payment from *B.*; therefore *A.* is not *B.*'s surety.

But it is otherwise in the principal case, for the plaintiff may maintain detinue on the bailment against the original hirer, as well as assumpsit on the promise against this defendant."

53. In the case of *Goodman v. Chase* (a), the plaintiff had recovered judgment against the defendant's son in a former action, and had taken him in execution. Upon his arrest he applied to the plaintiff's attorney for time to get the money, and in the mean time to be released from custody; and he was accordingly released upon the present defendant signing the following agreement:—"I do hereby undertake and agree to put the above defendant into the custody of the sheriff of Hampshire on or before Saturday next, and in default of my doing so, I undertake to pay the damages and costs for which the said defendant has been this day taken in execution by the said sheriff, at the suit of the above-named plaintiff." On the day mentioned the defendant's son offered to return into custody, but the under-sheriff would not receive him, and the present action was brought upon the above agreement; which, it should be observed, does not express a consideration, and therefore was not binding, if it was an agreement to answer for the debt of another, within the statute. The Court decided it was not within the statute, because, said Lord *Ellenborough*, "By the discharge of Chase junior, with the plaintiff's consent, the debt as between those two persons was satisfied. No case can be cited in which such a discharge has not been held quite sufficient. Then if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt between the plaintiff and Chase junior. That being so, it becomes wholly unnecessary to consider the question arising out of the construction of the fourth section of the Statute of Frauds."

54. Upon this reasoning of Lord *Ellenborough* it may be remarked, 1. That it implies the opinion that only colla-

(a) 1 Barn. & Ald. 297.

teral engagements are within the statute. 2. Had this learned judge thought the words of the statute ought to be interpreted in that literal extent in which some think they were in the case of *Kirkham v. Martyr*, instead of being taken as in the cases of *Read v. Nash* and *Buckmyr v. Darnell*, in the sense of a description of the contract of guarantie, he would have decided the defendant's promise to be within the statute; because, although it was not a guarantie, it also was not a promise to pay his own debt, but his son's debt; or literally it was a promise to pay the debt of another person. 3. Upon the question whether the promise was collateral, or an original one, the learned judge employed, as a test, an argument substantially derived from the definition of the contract of surety. Inferring from the exoneration of Chase junior, and the extinction of his debt, that the defendant's was not a collateral but an original promise, was the same thing as saying, where there is no principal debtor there can be no surety, here there is no principal debtor, therefore the defendant is not a surety. A person by becoming surety does not exonerate the original debtor. But Chase junior was exonerated, therefore the defendant is not his surety; and not being a surety the engagement is out of the statute.

55. If the creditor sells his debt, and contracts to transfer all his rights in respect of it to the purchaser, the agreement to pay the price is not a promise to answer for the debt of another within the statute; nor, it may be added, is it a promise of guarantie, because in the contract of guarantie there are three parties, creditor, debtor, and surety; but in the case supposed, the creditor relinquishes his rights, or exercises them only for the purchaser, and so there continue still only two parties. Thus, in *Anstey v. Marden* (a), an action for goods sold and delivered, the defendant pleaded in bar of a part of the plaintiff's claim, an agreement made between himself, the plaintiff, together with his other creditors, and T. Weston,

(a) 1 New Rep. 127.

which was stated in the plea to be to this effect:—that Weston should pay, and the creditors accept, an aggregate sum, equivalent to ten shillings in the pound, in full satisfaction of their respective debts. The plaintiff replied that the agreement was not in writing. At the trial it appeared that one of the terms agreed upon was, that the creditors should assign their respective debts to T. Weston; which stipulation, although not mentioned in the plea, was taken cognizance of by the Court, and the Court thought the agreement not properly a promise to answer (a) for the debts, but a purchase of the debts by Weston, and that as such it was not within the statute.

56. So (b) where it appeared that the original purchaser of goods, contemplating an inability to pay for them, had transferred them, with the consent of the seller, to the defendant, and the defendant urged the statute in his defence against the seller, the Court said there was no agreement here to answer for the debt of another, but it was a new sale of the goods to the defendant, and that an action could not have been maintained against Phillips, the original purchaser. It may be added, Phillips having ceased to be liable, the defendant was not his surety.

(a) *Per Sir James Mansfield, C.J.* The facts were shortly these:—The defendant was upon the brink of a bankruptcy; some of his creditors met to consider what should be done; and his effects being found only sufficient to pay 7*s.* 6*d.* in the pound, the creditors agreed to accept 10*s.* in the pound from Weston in full satisfaction of their debts, and undertook to assign their debts to him. The only object of the deed was the assignment of the debts, and Weston was to pay 10*s.* in the pound as the price of those

debts." *Per Rooke, J.* "It seems to me that this is the case of a purchase of a debt." *Per Chambre, J.* "I think it perfectly clear that this was a contract to purchase the debts of the several creditors, instead of being a contract to pay or discharge the debts owing by Marden. It was of the substance of the agreement that those debts should remain in full force, to be assigned to Weston."

(b) *Browning v. Stallard*, 5 Taunt. 450.

57. In *Tomlinson v. Gill* (a), a promise by the defendant to the widow of an intestate, to make good any deficiency of assets, if she would allow him to be joined with her in the letters of administration, was held not within the statute. This promise also was not a guarantee: 1. because there was no principal debtor; 2. the debtor was dead, and his goods were become the debtor; and in this respect the case is similar to the case of *Williams v. Leper* (b).

58. The cases are numerous of engagements by one person in favour of another, in consideration of the creditor's relinquishing some lien, fund, or security; as, for instance, an engagement by one person to pay the rent of another, if the landlord would relinquish his distress or right of distraining. Thus, in *Williams v. Leper* (c), the action was brought upon a verbal promise of the defendant to pay the plaintiff the rent due to him as the landlord of one Taylor, if the plaintiff would desist from distraining upon the effects of Taylor. It appeared that the defendant was a broker, and gave the promise upon the premises, and whilst he was in possession of the effects for the purpose of selling them for the benefit of the creditors of Taylor: and upon the question whether the defendant's promise was within the statute, Lord Mansfield

(a) In this case Lord Hardwicke, Chan. said, "The modern determinations have made a distinction between a promise to pay the original debt, and on the foot of the original consideration, and where it is a new contract. Here is quite a new and distinct consideration. *Read v. Nash* is strong to the purpose." If a person, to obtain credit for another upon a purchase not yet made, promises to pay the debt, the promise may be said to be on the foot of the original consideration; but if the promise is

made after the purchase is made, and after credit has been given, in consideration of forbearance, there is a new consideration: yet the latter promise, as well as the former, is a guarantee, and also within the statute. The case of *Read v. Nash* was one not simply of a promise upon a new consideration, but of a new contract, the circumstances of which excluded it from the class of contracts of surety.

(b) *Infra*.

(c) 3 Burr. 1886.

said, "The landlord has a legal pledge; he enters to distrain; he has the pledge in his custody; the defendant agrees that the goods shall be sold and the plaintiff paid in the first place. The goods, therefore, are the fund. The plaintiff has a lien upon the goods (a). Leper was a trustee for all the creditors, and was obliged to pay the landlord, who had the prior lien." Mr. Justice *Lawrence* said, "This case is neither within the spirit or meaning of the act. The tenant was here the original debtor. The plaintiff had two remedies against him. The plaintiff is in possession of the goods, having entered with intent to distrain them. Leper was the agent for the creditors. He makes this promise in order to discharge the goods of this distress. I consider this distress as actually made. Leper says, 'if you will quit the goods, and disincumber the fund, I will pay you.'" And Mr. Justice *Aston* said, "If this was a promise to pay the debt of Taylor I should think it within the statute. But I look upon the goods here to be the debtor; and I think that *Leper* was not bound to pay more than the goods sold for; the goods were a fund between both." Accordingly judgment for the plaintiff.

(a) The case of *Wood v. Nunn*, 2 Moore & Payne, 27, et 5 Bing. 10, seems to have been decided upon a similar view of the nature of the landlord's lien. In that case it appears, that early in the morning, the landlord hearing a dispute between his tenant and a stranger respecting a lathe then upon the premises, to which they both laid claim, entered and said, "the article shall not be removed till my rent is paid," and on the same day he sent his broker to distrain. In the mean time, the lathe had been

removed, notwithstanding which, the broker seized it, and the seizure was held to be rightful. "The distress," said *Best*, C. J., "commenced when the landlord came on the premises and said 'This shall not go till my rent is paid.' From that time the property was in the custody of the law, and being improperly removed, the landlord had a right to get it back." And, therefore, in the present action of trover by the owner for its recovery, judgment was given for the defendant.

59. *Bampton v. Paulin* (a) is similar. There the defendant, an auctioneer, whilst employed to sell the effects on certain premises, the rent of which was in arrear, was applied to by the landlord for the rent, the landlord saying "it was better to apply so than to distrain;" to which the defendant answered, "you shall be paid, my clerk shall bring you the money." And it was held that the defendant was liable, though his agreement was not in writing.

60. So too in *Barrell v. Trussell* (b), where the plaintiff being in possession of goods under an absolute bill of sale, forbore selling them upon the defendant's promising to pay the debt for which the bill of sale was given, the verbal promise was held to be sufficient.

61. *Houlditch v. Milne* (c) was decided by Lord Eldon at Nisi Prius, upon the authority of *Williams v. Leper*. The plaintiff, a coach-maker, had the carriages of a Mr. Copey to repair; they had been sent to him by the defendant; and when repaired were packed and sent on board ship under the order of the defendant; and the defendant, in answer to the inquiry, who was to pay for them? said, he would; but the bill of the repairs was made out to Mr. Copey. On these facts it was contended, that the defendant was a surety, and that the action was not maintainable, because the promise was not in writing. But Lord Eldon, after stating the general rule, that "to make a person liable for goods delivered to another, there must be either an original undertaking by him so that the credit was given solely to him, or there must be a note in writing," said, "there might be cases where the rule did not apply," such for example as that of *Williams v. Leper*; and then observing its analogy with the present, he said, "the plaintiffs had to a certain extent a lien on the carriages, which they parted with on the defendant's promise to pay; that I think took the case out of the statute."

(a) 4 Bing. 264.

(c) 3 Esp. N. P. C. 87.

(b) 4 Taunt. R. 117.

62. The case of *Edwards v. Kelly* (a) differs from *Williams v. Leper* only in this, that the plaintiff, the landlord of E. Kelly, instead of having merely threatened to distrain, had actually distrained, and in consideration of the plaintiff's delivering up the distress to the defendants, the defendants undertook to pay the rent due, and gave the plaintiff the following memorandum of agreement:—
 "We the undersigned hereby agree and undertake to pay to Thomas Edwards all such rent as shall appear to be legally due to him from Edward Kelly, the tenant of part of the *Barton of Rame* and tenement *Bastard Combe*, up to the 25th day of December, 1815." Signed by the defendants:—this memorandum does not express the consideration, and therefore is not sufficient, if it is within the statute, as a promise to answer for the debt of another; and upon that question the Court held that the case was governed by *Williams v. Leper*, and severally delivered their judgment as follows:—

Lord *Ellenborough*, C. J.—"Perhaps this case might be distinguishable from that of *Williams v. Leper*, if the goods distrained had not been delivered up to the defendants. But here was a delivery to them in trust, in effect, to raise by sale of the goods sufficient to satisfy the plaintiff's demand; the goods were put into their possession subject to this trust. So that in substance this was an undertaking by the defendants that the fund should be available for the purpose of liquidating the arrears of rent. There was therefore a consideration for this promise, partly falling within the authority of *Williams v. Leper*, partly within that of *Read v. Nash*."

Bayley, J.—"I think that the case of *Williams v. Leper* goes the whole length of deciding this case; and that in one particular it is stronger than that case; because in that a distress had not been made, here the plaintiff had the distress in his hands. It is only necessary to attend

(a) 6 M. & S. 204.

to the facts in order to see that this case is not within the statute. After the plaintiff had distrained, he held in his own hands his remedy for recovering the rent, and *the tenant was at that time no longer indebted; for so long as the landlord held the goods under distress, the debt due from the tenant was suspended*. What then, I would ask, is the substance of this contract? It is as if the defendants had proposed to the plaintiff in these words: you must convert the goods into money in order to satisfy yourself the arrears due, if you will allow us to do this we will pay you. And *what would this have been but an independent(a) contract between these parties?* I think that the present case is neither within the letter nor mischief of the act of parliament, which was aimed at cases where a debt being due from one person another engaged to pay it for him. But here, for the reason above stated, *at the time when the promise was made the debt was not owing from the tenant.*"

Abbott, J. said he thought this not a promise to answer for the debt of another. And Holroyd, J. evidently adopting the reasoning of Mr. Justice Bayley, said, "*If debt were brought for the arrears while the goods were under distress, the tenant might plead the distress in answer; which shews that the debt was for the time suspended*. The consideration for this promise was a fresh consideration, not merely moving to the tenant, but to those who made the promise to pay a debt which at the time did not exist as the debt of another."

According then to the view taken by Bayley and Holroyd, Js. the engagement in this case was an original engagement. The distress suspended the debt for which it was levied, and during its continuance, it exonerated the tenant from his personal liability; consequently when the engagement of the defendants was made there was no principal debtor, and therefore the defendant was not a

(a) The learned judge evidently *original* contract as distinguished uses this term in the sense of an *from a collateral contract*.

surety. And the engagement being an original one, it was only in conformity with the great majority of the other cases to hold it not within the statute(a).

63. In *Castling v. Aubert* (b) the plaintiff, an insurance-broker, held policies belonging to one Grayson, upon which he had a lien for his indemnity against acceptances which he was under for Grayson's accommodation. A loss had happened upon some of the policies; the defendant, to whom Grayson had transferred the management of his insurance concerns, in order to obtain an adjustment of it, applied for the policies; and the plaintiff gave them up, on the defendant's agreeing to indemnify him against his acceptances. But the agreement was only verbal, and the defendant insisted that it was within the statute. Lord *Ellenborough* however adjudged that the plaintiff was entitled to recover upon either of the two following grounds; first, that the defendant had received from the underwriters more than the amount of the plaintiff's claim; and to the extent of their claim or lien, it was money received to the use of the plaintiff; or, secondly, that the transaction was rather a purchase of the policies than a promise to answer for Grayson, though the discharge of Grayson would eventually follow. Mr. Justice *Lawrence* also considered the transaction as a purchase by the defendant of the plaintiff's interest in the policies; or as a promise to pay what the plaintiff would be liable to pay if the plaintiff would furnish him with the means of doing so.

Mr. Justice *Le Blanc* said, this is a case where a man having a fund in his hand which was adequate to the discharge of certain incumbrances, another party undertook that if that fund were delivered up to him he would take it with the incumbrances; this therefore has no relation to the Statute of Frauds (c).

(a) The same reasoning, it seems, would apply to the case of *Williams v. Leper*, and perhaps also to *Bampton v. Paulin*.

(b) 2 East's R. 325.

(c) This was the ground upon which Mr. Justice *Aston* relied in *Williams v. Leper*.

64. At one time it was much discussed, whether a (a) promise to pay the debt of another was within the statute, if the promise was made before the debt was due, or before the contract upon which the debt was to arise was executed, and Lord *Mansfield* is supposed to have determined the negative.

Thus, in *Mowbray v. Cunningham* (b), goods were delivered to *A.* at the request of *B.*, who said he would see them paid for; and Lord *Mansfield* held the promise not within the statute,—for this reason, *it is said*,—that at the time the promise was made there was no debt at all; so that Lord *Mansfield*, it would seem, interpreted the word "debt" in the sense of something actually due, and held as a general rule, that if the debt was not due when the promise was made, the promise, though properly a collateral one, was not within the statute. But upon examination it rather appears that Lord *Mansfield*, in this case, thought that *B.*, who ordered the goods, and not *A.*; was the debtor; that no credit was given to *A.*, and therefore that upon the facts *B.* was not a surety. "*This is a promise made before the debt accrues, and what is the reason of the tradesman's requiring that promise? It is because he will not trust the person for whose use the goods are intended.*" And in *Jones v. Cooper*, a case which occurred not long after, Lord *Mansfield* referred to *Mowbray v. Cunningham* as having been decided upon "the general distinction," evidently meaning the distinction between a collateral and an original promise.

65. In the case of *Jones v. Cooper* (c) goods were delivered to one Smith in consequence of a parol order by the defendant, and a parol promise in these words—"I will see you paid if Smith will not;" upon which Lord *Mansfield* said, "Where the undertaking is before

(a) See *Matson v. Wharam*, *ler*, J. in *Matson v. Wharam*, 2 *infra*, n. (b). T. R. 80.

(b) Cited by counsel in *Jones v.* (c) *Supra*, n. (b).
Cooper, 1 Cowp. 227; and by Bul-

delivery, and there is a direction to deliver the goods and I will see them paid for, it is not within the Statute of Frauds. But there may be a nicety *where the undertaking is before delivery and yet conditional*, as this is. It turns singly on the undertaking being in case the other did not pay.—We will look into it:” and the next day Lord *Mansfield* delivered the unanimous opinion of the Court as follows:—“We are all of opinion, on the authority of the cases in the books, that the promise by the defendant in this case to pay if Smith did not, is a collateral undertaking within the Statute of Frauds, and it is so clear it would be only spending time to go through the cases, or to say much about it.” Now from this judgment I think it evident that Lord *Mansfield*, in concurrence with the rest of the Court, understood the words “promise to answer for the debt of another” in the sense in which they are at present understood, as comprehensive of all promises of guarantie, without any distinction between debts due, and not due, at the time of the promise. “Where the undertaking is before delivery and conditional,” that is, where it is a guarantie, although it is for a debt not yet due, it is within the statute. It is evident also, that Lord *Mansfield* thought an undertaking by the person who orders goods or directs the delivery, *primâ facie*, an original undertaking, and therefore out of the statute; unless either by its express terms, as in *Jones v. Cooper* (a), or by extrinsic evidence, as in *Matson v. Wharam* (b), it appeared to be conditional, (collateral). And, therefore, also Lord *Mansfield* never could have decided the case of *Mowbray v. Cunningham* on the ground alleged, but must have viewed the defendant in that case as the sole debtor (c).

(a) See p. 51.

(b) See p. 53.

(c) It is not difficult to account for the misconception above attempted to be corrected. Whilst

Lord *Mansfield* viewed the defendant's engagement as an original undertaking, and thought no credit was given to the party for whom the goods were ordered,

66. The cases subsequent to this period establish what I have also no doubt was established in the opinion of Lord Mansfield, that if the person for whose use goods are furnished be liable at all, any other promise by a third person to pay for them must be in writing, without a distinction as to whether the promise is made *before* or *after* the goods are delivered.

Thus, in *Matson v. Wharam* (a), the defendant applied to one of the plaintiffs and asked him if he was willing to serve one Robert Coulthard, of Pontefract, with groceries: he answered, they dealt with no one in that part of the country, and did not know Coulthard: to which the defendant replied, if you do not know him you know me, and *I will see you paid*. The plaintiff then said he would serve him, and the defendant answered, he is a good chap, but *I will see you paid*. A letter was afterwards received by the plaintiffs from Coulthard, containing an order for goods; the goods were sent, and Coulthard, in the books of the plaintiffs, was made the *debtor*. The plaintiffs applied to Coulthard for payment, and, receiving no answer, they applied to the defendant, who refused to pay the money. There was no promise in writing, and the Court thought the plaintiff not entitled to recover. "If this were a new question," said *Buller, J.* "the bearing of my mind would be the other way; for Lord *Mansfield's* reasoning (b) in *Mowbray v. Cunningham* struck me very forcibly. But the authorities are not now to be shaken; and the general line now taken is, that if the person for whose use the goods are furnished be liable at all, any other promise by a third person to pay that debt must be in writing, otherwise it is void by the Statute of Frauds" (c).

but that the credit was given solely to the defendant, the quoters of the case viewed the defendant merely as a surety, and cited the judgment without adverting to this difference between *THEIR OWN* and the judge's view of the premises.

(a) 2 T. R. 80.

(b) See *ante*, pp. 51, 52, where I have endeavoured to shew that Lord *Mansfield's* reasoning was misunderstood.

(c) See also *Anderson v. Hayman*, 1 H. Bl. 121.

67. The cases upon the question to whom credit was given, which is itself usually only preliminary to the question whether the case is or not within the Statute of Frauds, are numerous; and to assist the judgment in like cases I will give specimens of them.

68. *Rains* and another, assignees of *Evelyn v. Storry* (a), was an action for goods sold and delivered. The defendant, therefore, was declared against not upon a guarantie, but as the person to whom alone the credit was given in the first instance. It appeared that the bankrupt's traveller had received an order from a Mrs. Stoker, who had referred him to the defendant; that the traveller went to the defendant, and told him of Mrs. Stoker's order, and said that he would not send the goods without the defendant's authority; upon which the defendant, after some inquiries as to the amount and terms of the order, said, "You may send them, and I'll take care the money shall be paid at the time." The traveller asked whether he might send any more, if Mrs. S. should want them? To which the defendant replied, "Not without letting me know." A letter was soon afterwards written to the defendant, requesting him to accept a bill for the amount of the order; to which he returned for answer, that he was not in the habit of accepting bills, but that the money would be paid when due.

The counsel for the defendant referred to the case of *Mines v. Sculthorpe* (b), in which it was ruled that a guarantie must be declared upon specially, and in which the plaintiff was nonsuited, because, as in the present case, the action was in indebitatus assumpsit: but *Best, C.J.* asked, Then is not this a direct undertaking by the defendant? And for the defendant it was submitted it was not; and the rule laid down in *Matson v. Wharam*, that if the person for whose use the goods are furnished be at all liable, any promise by a third person to pay for them must be in writing, was referred to.

(a) 3 Carrington & Payne, N. P. C. 131. (b) 2 Camp. N. P. C. 215.

Best, C. J., then said, if you show that any credit was given to Mrs. Stoker, you will bring your case within that of *Matson v. Wharam*. At present I do not think you are within that case. If you will show that a bill of parcels was sent to Mrs. Stoker, I will nonsuit the plaintiff.

Proof of the bill of parcels was not given; but several letters were put in, in one of which, from the bankrupt to the defendant, the expression occurred, "the goods you *guaranteed* for Mrs. Stoker have been delivered;" and in another, the following expression: "I once more write respecting my account, which you *guaranteed* to me," &c.

Upon this evidence *Best*, C. J. nonsuited the plaintiff, and no motion was made to set aside the nonsuit.

69. In *Keate v. Temple* (a) the plaintiff was a tailor and slop-seller, the defendant the first lieutenant in H. M. S. the *Boyne*. The defendant had applied to a friend to recommend him a slop-seller to furnish the ship's crew with clothes, saying, "He will run no risk, I will see him paid." The defendant's friend recommended the plaintiff; and the defendant, in conversation with the plaintiff, told him, "I will see you paid at the pay table, are you satisfied?" to which the plaintiff answered, "perfectly so." And consequently he supplied the clothes required; soon after which the *Boyne* was burnt, and the crew dispersed into different ships. On that occasion the plaintiff having expressed some apprehensions for himself, was told by the defendant, "Captain Grey (the Captain of the *Boyne*) and I will see you paid: you need not make yourself uneasy." After this a commissioner came on board the *Commerce de Marseilles* in order to pay the crew of the *Boyne*, and the defendant, who was standing at the pay-table, took some money out of the hat of the first man who was paid, and gave it to the plaintiff; but the next man refused to part with his pay, and was immediately put in irons. The defendant then asked the commissioner to stop the pay of the crew, who answered it could not be done, and consequently the plaintiff brought the present

(a) 1 Bos. & Pul. 158.

action. The action was not special as on a guarantie, but was for goods sold and delivered to the defendant; the defendant, therefore, was charged as the debtor (*a*) or person solely liable in the first instance; and a verdict was found against him, but the Court set it aside and granted a new trial, on the ground that the sum recovered, 576*l.* 7*s.* 8*d.* was so large as against a lieutenant in the navy, that it never could have been in the contemplation of the defendant to make himself liable, or of the slop-seller to furnish the goods to so large an amount on his credit; that, in short, from the nature of the case, it was apparent that the men were to pay in the first instance. "The defendant's words," said *Eyre*, C. J. "were, 'I will see you paid at the pay-table; are you satisfied?' and the answer then was, 'Perfectly so.' The meaning of which was, that however unwilling the men might be to pay themselves, the officers would take care that they should pay. The question is, whether the slopman did not in fact rely on the power of the officer over the fund out of which the men's wages were to be paid, and did not prefer giving credit to that fund (*b*) rather than to the lieutenant, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum."

Upon this judgment one remark arises, of some importance: from the nature or circumstances of the case it was inferred that the defendant did not intend to make himself liable; and hence those dicta which leave out of consideration the circumstances of a case, and give rules as to the effect of a promise merely with reference to the manner in which it is expressed, are necessarily fallacious: for example, such dicta as the following of *Holt*, C. J.:—"So if *A.* promises *B.*, being a surgeon, that if *B.* cure *D.* of a wound he would see him paid, this is only a promise to pay if *D.* does not, and therefore ought to be in writing, by the Statute of Frauds. But if *A.* promise *B.*

(*a*) A guarantie must be declared upon specially. *Mines v. Sculthorpe*, 2 Camp. N.P.C. 214.

(*b*) This reasoning seems to have influenced the decision in *Prosser v. Allen, Gow*, N.P.C. 117.

in such a case that he will be *B.*'s paymaster, whatever he shall deserve, it is immediately the debt of *A.*, and he is liable, without writing."

And the following, *per Lee*, C. J. "If *A.* promises to pay *B.* if *C.* does not, *A.* is but a surety; but if *A.* promises that *C.* shall pay, he is a principal."

70. In *Dixon*, assignee of Moore, a bankrupt, v. *Hatfield* (a), the action was upon the following agreement:—"I Richard Hatfield do agree to pay Mr. J. Moore 50*l.* for timber to house in Annett's Crescent, out of the money that I have to pay William West, provided West's work is completed." The declaration stated, that at the time of the making of this promise, it was agreed between West and the defendant, that West should complete certain carpenter's work for the defendant, at a certain house belonging to the defendant, and that, in consideration that Moore would furnish West with timber for that purpose, the defendant made with Moore the above agreement: the declaration therefore was applicable either to the supposition of the timber being supplied on the credit of West, or only of the defendant. Upon this evidence *Best*, C. J. left it for the jury to say "whether the timber had been furnished on the credit of the defendant," and the jury found for the plaintiff. Upon a motion for a rule nisi to set aside the verdict, *Park*, J. said he was of opinion that this was not a collateral, but a direct undertaking by the defendant himself to pay Moore when the work was completed. And the learned judge put the following case:—"If a person go to a timber merchant, and say that he has contracted with *A. B.* to build a house for him; and that he would pay for the timber furnished to *A. B.* for that purpose, it amounts to an original undertaking by the party giving the order, as the timber would be furnished on his own account; but if it were to be supplied for the use of *A. B.*, on the credit of such party, the agreement must not only be in writing, but the consider-

(a) 10 J. B. Moore, 42; S. C. 2 Bing. 439.

ation for the promise must be expressed on the face of it : here, however, no credit was given to West," &c.

71. In *Croft v. Smallwood*(a), the declaration stated that the plaintiff, a tailor, being applied to by one George Foster to supply him with certain wearing apparel, the plaintiff was unwilling to supply it upon Foster's credit, and refused so to supply it; and that in consideration that the plaintiff would supply the said wearing apparel to Foster, the defendant promised to pay for it.

On the part of the plaintiff it was proved, that the clothes had first been sent home to Foster by the plaintiff's foreman, he himself being then out of town; but that the foreman prevailed on him to let him have them again; soon after which the defendant came to the plaintiff's shop, and said, that if they were sent again he would pay for them. It was also proved that the defendant being some time after applied to for payment, said it was not then convenient to him, but that he had a bill would soon be due, when he would pay.

For the defendant *Matson v. Wharam* was cited. But *Eyre, C. J.* was of opinion that the whole credit was given to the defendant, that the defendant was liable, and the case was not within the Statute of Frauds.

72. In *Edge v. Frost* (b), the plaintiff having begun to fit up the Royal West London Theatre with gas-apparatus, upon the application of Mr. Brunton the lessee, but having subsequently become doubtful of Mr. Brunton's pecuniary ability, was induced to proceed, only in consequence of the following note addressed to him by the defendant: "Royal West London Theatre, Monday, 9 Sept. 1822, I hereby undertake to Mr. Thomas Edge, to see him paid for the gas-apparatus he has put up and furnished for Mr. J. Brunton, according to the work to be performed in a scientific manner, as shall be thought necessary and

(a) 1 Esp. N. P. C. 121.

(b) 4 Dowling & Ryland, 243.

approved by Mr. Evans, the superintendent of the gas-works in Peter Street."

It appeared at the trial that the defendant had himself given orders about the work both before and after the above guarantie was given; upon this evidence the learned judge (*Abbott, C. J.*,) told the jury that the defendant was liable independently of the guarantie (*a*), although he had no interest in the theatre; and a verdict having been found for the plaintiff, the Court refused a new trial.

73. So (*b*) in an action upon the following and other similar notes:—"Gentlemen, Please to deliver 2 pipes of spirits for Mr. J. Parry, of Hatfield Street (the son of the defendant,) and will oblige your humble servant, J. Parry," (the defendant); the Court said, the notes are positive orders by *A.* for the delivery of goods to *B.*; and the necessary effect of them both in law and common sense is either to make *A.* the principal debtor, or to make him the surety for *B.* The plaintiff having given credit to *B.*, of course *A.* was a surety only.

74. In *Thomas v. Cooke* (*c*) the plaintiff, at the request of the defendant, had joined him in a bond to indemnify one Morris from certain partnership debts of Morris and W. Cook, which W. Cook undertook to pay on the dissolution of the partnership; and the defendant promised to save the plaintiff harmless. The plaintiff was compelled to pay 360*l.* under the bond; and to the present action for the recovery of so much of the sum as was not previously reimbursed to him, the defendant objected that the Statute of Frauds had not been complied with: but the Court remarked, that had the promise been to Morris, the creditor, (which it was not,) it would have been a promise to answer for the debtor, but it was a promise of indemnity; and Mr. Justice *Bayley* said, "this ac-

(*a*) It was questioned whether the note sufficiently expressed the consideration for it to be available as a guarantie.

(*b*) *Langdale v. Parry*, 2 D. & R. 337.

(*c*) 8 B. & C. 728. S. C. 3 Manning & Ryland, 444.

tion is founded, not on the debt due to Morris, but on the consent to enter into the bond jointly with the defendant; a promise to indemnify does not, as it appears to me, fall within either the words or the policy of the Statute of Frauds."

75. Out of motives of friendship, and merely to accommodate the defendant, the plaintiff had accepted several bills of exchange on his account. These bills were all paid by the defendant except the last. For the last the holder accepted 16*l.* in part, and the plaintiff's acceptance for six guineas, the balance. This bill not being paid when due, the holder brought his action against the plaintiff as the acceptor, and *the defendant desired her to defend it*, representing to her, that as she had no consideration for the acceptance she might safely do it: in consequence of which representation she did defend the action, and 30*l.* was recovered against her^(a). To the present action for the recovery of this sum, the defendant objected, under the Statute of Frauds, that there was no note in writing, which it was contended was necessary, because the object of the action was to recover from the defendant a sum of money which was the debt and costs in an action against herself and upon her own acceptance, and which therefore was to be deemed her own debt; but Lord *Kenyon* overruled the objection, and said, that the plaintiff never had any consideration whatever; *that the defence to the action on the note was on the defendant's account*; that as he directed the defence to be made by which he might have been benefited, the money might be considered to have been laid out by the plaintiff on his account, and that therefore she was entitled to recover it back.

76. In virtue of the special jurisdiction exercised by the Courts over their own officers, they will, upon motion, enforce against an attorney, who is considered as an officer,

(a) *Howes v. Martin*, 1 Esp. N. P. C. 163.

an undertaking which could not be enforced by action, in consequence of its not containing the consideration.

In *Evans v. Duncombe*(a), a case in the Court of Exchequer, the attorney for the defendant, after notice of trial had been given, gave the following undertaking:— "I the undersigned agree to pay the debt and costs in this action." In consequence of which the plaintiff did not proceed to trial; but the attorney afterwards refused to perform the undertaking; and a motion was made for a rule for him to show cause why he should not pay the said debt and costs, and the costs of the application. It was conceded by counsel that there were apparently two objections to the application: 1. That the attorney was not an attorney of that Court, (he had acted in the cause through a Clerk in Court): 2. That no action could be brought upon the undertaking; but a case was cited which was conclusive against the first objection, and a rule nisi was granted; against which no cause was shown, and it was made absolute, upon the authority of a case in the Court of K. B., which met the second objection. That case, *Re GREAVES*, Gent. was as follows. An action having been commenced in the Common Pleas and judgment obtained, Greaves, the attorney for the defendant, and who was an attorney of the Court of King's Bench, though not of the Common Pleas, proposed to compromise the action, and agreed *verbally* to give his two promissory notes for the debt and costs, payable at six and nine months, in consideration of the plaintiff staying proceedings. This was accepted by the plaintiff; but Greaves afterwards declined to give the notes; whereupon a rule was obtained, calling upon him to pay the debt and costs, and cause was shown against the rule. The cause shown was, that the promise was void by the Statute of Frauds, for the original defendant still remained liable; and that it was not usual for Courts to in-

(a) 1 Crom. & Jervis, 372.

terfere to enforce a mere parol promise where there is nothing criminal. But the Court said, "Even supposing the undertaking to be void by the Statute of Frauds, this Court may, nevertheless, exercise a summary jurisdiction over one of its own officers, an attorney of the Court. The undertaking was given by the party in his character of attorney, and in that character the Court may compel him to perform it. An attorney is conusant of the law, and if he give an undertaking which he must know to be void, he shall not be allowed to take advantage of his own wrong, and say that the undertaking cannot be enforced."

77. If *A.*, being the debtor of *B.*, agrees that *B.* shall receive from *C.* a debt which the latter owes to *A.*, a promise by *C.* to *B.* to pay the debt to *B.*, is not within the statute. And therefore in *Lacey v. M'Neile* (a), where a person who was indebted to the plaintiffs assigned for their security a debt due to him from the defendant, and one of the defendants (partners) made a *parol* promise to pay it to the plaintiffs, such promise was held sufficient (b).

78. But if *A.*, being the debtor of *B.*, agrees that *B.* shall receive from *C.* money which *C.* *will have to pay to A.*, *provided A. performs a certain work* which he has undertaken, would a promise by *C.* to pay *B.* be within the statute? I should answer no, with scarcely a doubt, were it not that some slight doubt arises upon the question from the report of *Perkins v. Moravia* (c). In that case the declaration stated, that in consideration that the plaintiffs would discount a bill of exchange for 1000*l.* for one Benjamin, the defendant undertook to pay them such

(a) 4 Dowling & Ryland, 7. See also *Hodgson v. Anderson*, 5 D. & R. 735. S. C. 3 B. & C. 842.

(b) In *Wilson v. Coupland*, 5 B. & Ald. 228, the plaintiffs were creditors and the defendants debtors to *T. & Co.*, and by consent of all the parties it was arranged that the defendants should

pay to the plaintiffs the debt due from them to *T. & Co.*,—and it was held, that as the demand of *T. & Co.* upon the defendants was for money had and received, the defendants were liable as for money had and received, even to the plaintiffs.

(c) 1 Carrington & Payne, N. P. C. 376.

money as should be due from him to Benjamin for work done. The undertaking was as follows:—"Messrs. Perkins and Co. Gent., I engage to pay you the amount which shall be due from me to Mr. Benjamin for any work he shall do for me between this and Christmas next;" and for the defendant it was contended that it was void, because it was a promise to answer for the debt of another, and it does not express the consideration. But for the plaintiffs it was replied, that it was an assignment of a *chose in action*; and *Wilson v. Coupland* (a) was cited. But *Abbott*, C. J. said, "It is an assignment of a thing not *in esse*; *Wilson v. Coupland* is not like this case." *Scarlett* rejoined, "it is an original contract; I undertake to pay you such money as shall be due." But *Abbott*, C. J. said, "It is to go to reduce the bill, and therefore it is to answer for the debt of another." The plaintiff however had a verdict; and therefore probably the eventual opinion of the learned judge was, that the defendant's promise was not within the statute.

79. In *Jarman v. Algar* (b), the defendant, in consideration that the plaintiff would forbear to arrest *G. F.* upon a writ of latitat, entered into the following undertaking:—"I hereby undertake to sign a bail-bond for the above defendant (*G. F.*) in this action, either on a writ issued into Sussex or Middlesex, when tendered to me within one week from this date." *Abbott*, C. J. said, "I am of opinion this case is not within the Statute of Frauds. It is not an undertaking to answer for the debt, default, or miscarriage of another."

80. If a promise to pay the debt of another forms part of an agreement, and is so connected with the other part that the whole forms only one entire contract, the contract is wholly void unless it is in writing; and that part of it cannot be enforced, which standing by itself would be out of the statute (c).

(a) *Ante*, p. 62, n. (b).

P. C. 249; S. C. 1 R. & M. N.

(b) 2 Carrington & Payne, N.

P. C. 348.

(c) *Chater v. Becket*, 7 T. R. 201.

But a promise to pay the debt of another may be connected with a promise to do something else, in such a manner that each forms of itself an entire agreement; in which case each is susceptible of separate enforcement, and the invalidity of the one will not affect an action upon the other (a).

81. Whether the *del credere* contract of a factor, broker, or other agent, with his principal, is within the Statute of Frauds, depends on the nature of the contract and its legal consequences. Upon the subject of its legal consequences, the cases are at variance. What is a commission *del credere*? asked Lord *Mansfield, C. J.*, in the case of *Grove v. Dubois* (b), a case of an insurance broker, and answered, "It is an absolute engagement to the principal from the broker, and makes him liable in the first instance. There is no occasion for the principal to communicate with the underwriter, though the law allows the principal, for his benefit, to resort to him as a collateral security. The broker is liable, at all events." Upon the same question, in the case of a factor (c), remarks are ascribed to Mr. Justice *Chambre*, implying the opinion, that although with relation to the vendee the factor is to be considered as a principal, yet with relation to his own employer he is surety for the vendee to the employer: "Where a factor sells under a *del credere* commission, *whereby he becomes responsible for the price*," &c. "If he acts under a *del credere* commission, he is to be considered as between himself and the vendee as the sole owner of the goods. But if he sell without a *del credere* commission, it is well established that he does not become a surety" (d). In the latter remark there is an obvious implication, that the kind of responsibility meant in the first sentence was that of surety. And this view seems established by *Morris v.*

(a) So ruled by Lord *Lyndhurst*,
C. B. in *Wood v. Benson*; see *ante*,
p. 13, n. (b).

(b) 1 T. R. 112.

(c) *Houghton v. Matthews*, 3 B.
& P. 485.

(d) *Ibid.* p. 489.

Cleasby (a). In that case Lord *Ellenborough* said, "The defendant relies on his commission *del credere*, or rather on some expressions which have at different times been reported to have been used by judges of great name, on the effect of such a commission. In correct language, a commission *del credere* is the premium or price given by the principal to the factor for a *guarantie*; it *presupposes* a *guarantie*. But whatever term is used, the obligation of the factor is the same—it *arises upon the guarantee*. The guarantor is to answer for the solvency of the vendee, and to pay the money if the vendee does not; on the failure of the vendee, he is to stand in his place, and to make his default good. Where (b) the form of action makes it necessary to declare upon the *guarantie*, application to the principal must be stated on the record: and in all cases it must, if required, be proved, though in the case of a foreigner very slight evidence may be sufficient" (c). And after remarking upon the above opinion of Lord *Mansfield*, as one which seemed to reverse the relative situations of principal and factor, and to have a tendency to introduce uncertainty and confusion into the law upon this subject, the learned chief justice said, "The principal (vendee) must always be debtor, and that whether he is known in the first instance or not, except where the broker has, by the form of the instrument, made himself so liable."

This is the doctrine which prevails at present; and I think it clear, that the *del credere* contract, so explained, is within the Statute of Frauds, and must be in writing:

(a) 4 M. & S. 566. The facts of this case bear no relation to the present question; I therefore quote only the judgment, where the nature of a *del credere* contract is considered in a general point of view.

(b) This sentence is evidently an incorrect report. It, however,

appears that the learned judge was enforcing his view by shewing that in an action against a *del credere* agent, the declaration must contain the same averments as those required in a declaration against common sureties.

(c) See also *Gall v. Comber*, 1 J. B. Moore, 279.

CHAPTER IV.

OF THE EXTENT OF THE CONTRACT OF SURETY.

82. One consequence of the definition (a) of the contract of surety is, that the surety is not obliged to a greater extent than the principal debtor. The cases, the decision of which is in conformity with this principle, conjointly with other considerations, are numerous.

If a person is surety for the fidelity of another in an office of limited duration, or the appointment to which is only for a limited period, he is not obliged beyond that period.

Thus, the case of *Arlington v. Merricke* (b) was an action upon a bond, in the condition of which it was recited, that the plaintiff, who was postmaster-general, had appointed Thomas Jenkins his deputy for a certain stage, for the term of six months from the 24th of June, in the 19th year of Charles 2; and the condition was, that the obligation should be void if Jenkins should, *during all the time he continued deputy*, faithfully execute the duties of his office. The defendant pleaded that the condition was performed: the plaintiff replied, that Jenkins continued deputy until September in the 22d year of the king, at which time he committed a breach of duty; and upon demurrer to the replication judgment (c) was given in

(a) *Ante*, p. 3.

(b) 2 Saund. R. 403.

(c) From the number of cases similar to this, in which conditions expressed in very general terms have been held obligatory only to the extent of the recitals by which they are preceded, it has been stated as a general rule of interpretation, that the condition, when larger than the recital, is restrained by the recital. Each adjudication,

however, from which the rule may be inferred, rests upon some principle of reason, the perception of which is of the greatest importance in interpretations, and which is to be found in a comparison of the respective nature and objects of the recital and condition. The bond itself is an engagement to pay a sum of money at all events: the condition expresses the terms, the performance of which, it has

favour of the defendant, because Jenkins (a) could not continue deputy for any longer time than six months without a new appointment.

83. The case of *The Liverpool Water-works Company v. Harpley* (b) was decided upon the authority of *Arlington v. Merricke*. That case was an action against a surety upon a bond, in which it was recited that one Atkinson had agreed with the plaintiffs to collect their revenues from time to time for twelve months from the date thereof. The condition was, that the bond should be void, *if Atkinson should from time to time annually, and at all times thereafter during the continuance of his employment,*

been agreed, shall discharge the bond; the bond, therefore, is merely penal, to secure the performance of the condition; and consequently the condition is in fact the principal engagement. Now, the recital is a preamble to the condition, explanatory of what has passed in negotiation, and supposing it to be complete, the condition ought to express nothing more than is contained in the recital. The condition is, as it were, a technical version of the recital, framed with a view to a future operation. Hence the rule that the condition is to be restrained by the recital. But the recital may be imperfect, and of its imperfectness the condition itself may afford sufficient evidence. In this case it is evident the rule alluded to does not take place, as is evinced in the cases of *Sansom v. Bell*, *Pearsall v. Summerset*, and some others, which will be noticed in the text.

(a) Had the action been against Jenkins, as it might, (he being a party to the bond,) there would have been the same decision. The bond itself was a security only for Jenkins's first appointment, he himself, therefore, would not have been liable upon the bond for a breach of duty under any subsequent appointment: as appears, indeed, from the case of *Horton v. Day*, cited by *Twysden, J.* in support of the principal decision. That was an action by a sheriff against his bailiff upon a bond conditioned for the defendant's executing duly *all* warrants to him directed. From the recital it appeared that the defendant was appointed bailiff only of a certain hundred; and the Court adjudged that by *all* warrants, were only meant all warrants directed to the defendant as bailiff of the hundred, and not others.

(b) 6 East, 507.

use due diligence, and account for and pay over all the money he should receive for the plaintiffs. The plaintiffs averred that they continued Atkinson in their employment for a period, which a reference to the date of the bond shewed to be nearly three years, and that during that period he had received various sums which he had not paid over. The defendant pleaded that Atkinson had paid over all he received during the first twelve months after the date of the bond; and upon demurrer to this plea the Court gave judgment in favour of the defendant; because the defendant was obliged only for the period mentioned in the recital as the duration of Atkinson's appointment.

84. So in the case of *The Wardens of St. Saviour's, Southwark, v. Bostock* (a), the bond in suit recited the appointment of one Armstrong to collect the church-rate of St. Saviour's, Southwark; and that he was to be accountable for it to the Wardens of the Grand Account. The condition was for his accounting to the Wardens of the Grand Account for the time being, *or thereafter to be*. The defendant pleaded a performance of the condition by Armstrong whilst he continued in the office by virtue of the recited appointment. It was replied that Armstrong continued in the collectorship under successive annual appointments; and a breach of duty was alleged, after the expiration of the first appointment. It appeared, therefore, upon the pleadings, though not upon the bond, that the office was annual, and consequently, upon demurrer to the replication, the Court gave judgment for the defendant. The stipulation for Armstrong's accounting to the wardens thereafter to be, was held to mean merely, that in the event of the death of any of the then wardens during the current year, Armstrong should account with their successors; which by law he was obliged to do, and therefore the stipulation was unnecessary.

(a) 2 New Rep. 175.

85. So in *Leadley v. Evans* (a), where the condition was, that if John Bailey, who it was recited had been appointed collector of the poor-rate, should from time to time, and at all times when required, produce to the churchwardens and overseers, or their successors, a true account of all sums of money which should come to his hands as collector, and should truly pay such money to the churchwardens and overseers, or their successors, then the obligation should be void; *Best*, C. J. in delivering judgment, asked, "To what office was Baylie appointed? That of collector of church and poor-rates. And whose duty was it to collect those rates? The overseers. And if the office of overseer be annual, so must that of the deputy." Consequently the defendant, the surety, was obliged for only a year, though his principal continued to be overseer longer.

86. Where also a bond was taken under an act of parliament, conditioned for the due collection of certain rates and duties *at all times thereafter*, and it did not appear on the record that the collector's appointment was limited, or his office annual, but the act made it annual, the Court held that the surety was obliged for a year only (b).

87. On the other hand, although the surety is not obliged to a greater extent than his principal, he is understood to be obliged to the same extent, unless he has expressly limited his obligation. Therefore, where a bond was taken under an act of parliament with a condition for *A. B.*'s accounting for all monies received by him in virtue of the act, and the act did not make the office annual, the Court held that the obligation of the sureties was not confined to a year, although the defendant pleaded that the office was an annual one (c).

88. In *Saunders v. Taylor* (d) the defendant was surety

(a) 2 Bing. 32; S. C. 9 Moore, 102.

(b) *Peppin v. Cooper*, 2 B. & A. 431.

(c) *Curling v. Chalklen*, 3 M. & S. 502.

(d) 9 B. & C. 35.

for J. Hutchins, in a bond, the condition of which, after reciting Hutchins's appointment to be collector to the commissioners of sewers, and that he *would* be entitled to receive several rates and assessments, was, for Hutchins to render an account of all such sums of money as should be given in charge to him by the commissioners for the time being, and also to account and pay over to the commissioners for the time being all such sums of money as *he had already received*, or should thereafter receive, by virtue of any rates for and on account of the commissioners of sewers.

Hutchins had been collector of the rates under a commission prior to the one appointing the commissioners to whom the bond was given, and his account was in arrear of rates made under such prior commission. For the defendant it was argued, that the recital that Hutchins would be entrusted, rather imported that he was not to be liable at all before the date of the bond, (26th of May, 1826,) or that if the subsequent part of the condition rendered him liable at all for by-gone payments, still the liability could not be carried further back than to payments made between the 3d of March, when the plaintiffs were appointed commissioners, and the 26th of May, the date of the bond. But the Court were of a different opinion, and held that the bond extended to payments received on account of a rate made by prior commissioners, acting under a commission which expired before the appointment of the plaintiffs, and before the date of the bond.

"In construing this instrument," said Lord *Tenterden*, C. J. "it is proper to attend to the character of commissioners of sewers as well as to the words of the bond. The commissioners act under commissions issued from time to time by his majesty, for the discharge of a public trust for the public benefit; the trust and the benefit are permanent, although the personal authority of the commissioners is temporary, and acts begun under one commission are continued under another. Orders made under

one commission are enforced under another, just as proceedings begun under one commission of oyer and terminer, and gaol delivery, are carried on under another, although all the commissioners may be changed. The commissioners for the time being act not as a corporation, but they are in many respects analogous to a corporation. A rate made by the commissioners appointed at one time, if not wholly collected and accounted for before a new commission issues, is to be collected after such new commission, and to be paid to and applied by the persons appointed under the new commission, the trust, the benefit, and the object still remaining unchanged. The collector appointed under a new commission certainly may be the officer by whom the arrears of a former rate are to be collected and accounted for; the account must be rendered to the new commissioners, whether collected by an officer of their own appointment or by an officer appointed under the former commission, because the personal authority of the commissioners appointed under the former commission has ceased; and so it must be if the officer appointed under the former commission had received the money before the new commission took effect, and had not accounted for it to the new commissioners by whom it was appointed. If, therefore, a collector appointed under a former commission should be appointed under a new commission, and there should be any money then in his hands, or any money should afterwards come into his hands as arrears of a former rate, he must account for and pay over such money to the commissioners from whom he receives his new appointment, so long as their commission remains in force. This being so, a bond, taken for the due discharge of the office of a reappointed collector, *would not be applicable to the whole duty of his office, if it should be confined to the collecting and accounting for a rate made under the commission in force at the time of his appointment.* It is true, however, that the language of a condition may be such as to require this limited and

confined construction. We are, therefore, to look at the language of the condition of this bond, in order to ascertain whether it be so limited; and upon the perusal and consideration of its language we are clearly of opinion that it is not so limited, but extends, as it ought to do, to all monies received by the collector Hutchins."

89. If the surety's engagement relates to a particular office, it extends only to such things as were included in the office when the engagement was entered into. Thus, a person who became surety for a collector of the customs revenue, upon his appointment in 1691, was held not liable in respect of the customs on coals, which were first imposed in 1698 (a).

90. Upon the same principle *Legh v. Taylor* (b) was decided. That case was an action upon a bond against the defendant as surety of T. Hutton, who, it was recited, had been duly elected overseer; and the condition was for Hutton's truly accounting for all sums not exceeding 100*l.*, which should come to his hands by virtue of his office of overseer. It appeared, that amongst the sums included in his accounts, and for which he was debtor, there was one of 100*l.* which he had *borrowed* for parochial purposes, without the direction of the parishioners; and the Court held that that sum ought not to be charged against the surety, because it was no part of the duty of an overseer to borrow money.

91. If a person engages as surety FOR A PARTICULAR INDIVIDUAL, the engagement is understood to extend to the acts of that individual alone, and it will not continue if he takes a partner.

Thus, in *Bellairs v. Ebsworth* (c), the plaintiffs, who were country bankers, took from Philip Nott, their London agent, a bond conditioned for his paying from time to time and at all times thereafter, when required, all

(a) *Bartlett v. Attorney-General*, Parker, 277; *Bowdage v. Attorney-General*, *ibid.* n. (a).

(b) 7 Barn. & Cres. 491.

(c) 3 Camp. N.P.C. 52.

monies, and delivering all securities, which he should receive for them; and the defendant joined him in the bond as his surety. At the time of the execution of the bond Nott had no partner, but subsequently he entered into partnership with two persons, with whom he carried on the same business under the firm of Mingay, Nott & Co. The plaintiffs continued to employ the new firm until it failed, when a considerable sum was due, the whole of which accrued subsequently to the formation of the partnership. And this being the only sum claimed, Lord *Ellenborough* nonsuited the plaintiffs, and said, "The defendant was surety for Philip Nott, and not for Mingay, Nott & Co. When the plaintiffs entrusted their agency to the new firm, the defendant's responsibility was at an end. He by no means undertook for the good conduct of any future partner with whom Nott might associate. The recital and the whole scope of the condition show that the suretyship was confined to P. Nott individually."

92. In like manner, if a person engages as surety FOR MORE PERSONS THAN ONE, the engagement is understood to be on behalf of those individuals collectively and jointly; and in case of the death of any of them, it will not continue on behalf of the survivors; unless, indeed, it appears, and that very clearly, that it was intended to continue on behalf of the survivors.

Thus, in *Simson v. Cooke* (a), the defendants were sued as executors of W. Peareth, upon a bond which he had entered into jointly with John Cooke and Thomas Cooke, who were bankers at Sunderland, to secure such sums as should be advanced by the obligees to meet bills drawn by John Cooke and Thomas Cooke, or either of them; and the bond was held not to extend to bills drawn by John Cooke after the death of Thomas Cooke. Reasoning against the supposition of the bond being intended to extend to advances made after the death of one of the

(a) J. B. Moore, 588; S. C. 1 Bing. 452.

partners, Lord *Gifford*, C. J. said, " why were not some such words as the following inserted, ' at whatever time such bills shall have been drawn, whether during the partnership or afterwards?' without the addition of any such expression, the words ' or either of them' must be confined to the acts of either of them during the copartnership. A principal motive for Wm. Peareth's joining as a surety might have been an opinion entertained by him as to the integrity and discretion of the deceased partner; and if he had been requested to have extended his liability beyond the life of that gentleman, he might have refused to do so. So with respect to the liability of his own representatives, he might have been willing to charge them during the life of Thomas Cooke, but not afterwards."

93. In *Kipling v. Turner* (a) the persons for whose benefit the bond in suit was taken were described in the recital as R. M. and J. S. *defendants*, against whom certain persons had filed their bill of complaint in Chancery; in the condition their names were not repeated, but they were designated simply as the defendants; and the condition was for the payment of all such costs as the Court should award to the defendants. Upon which it was decided (*Abbott*, C. J. *dub.*) that the death of one of the persons named (that is one of the defendants) did not put an end to the bond, but that the present defendant was liable for costs awarded afterwards. "This bond," said *Bayley*, J. "is not conditioned to pay such costs as the Court of equity shall award to R. M. and J. S. by name, but to pay such costs as shall be awarded by that Court to the defendants, and I think that the meaning of that is, that the present defendant undertakes to pay all such costs as shall be awarded by the Court to those who at that time fill the character of defendants in equity. The case is very different where persons are described by character, and where they are described by name."

94. If a person engages as surety TO A PARTICULAR INDIVIDUAL, the engagement is understood to be only to

(a) 5 B. & Ald. 261.

that individual, and it ceases if he takes a partner, or, it will not extend to matters in which his partner is interested. Thus, in *Wright v. Russell* (a) the action was brought upon a bond in which the plaintiff was the sole obligee, and the bond was conditioned for A. B.'s fidelity as long as he should continue in the plaintiff's service as a broad clerk. The defendant pleaded, that when the bond was given, the plaintiff carried on the trade of a brewer in his own name only, and on his own account only, without a partner; that the service mentioned in the condition was meant to be a service to the plaintiff carrying on trade on his own account only; that afterwards, the plaintiff entered into partnership, and that all the time the broad clerk served the plaintiff alone he served him honestly, and accounted to him justly. The plaintiff replied, that A. B. continued in his service as broad clerk after he had taken a partner; and assigned as a breach of the condition, that the broad clerk received money *on account of the partnership*, and had not paid it to the partners. To this the defendant demurred, and judgment was given in his favour. *Per Curiam*. "It is truly said, that the defendant (the *surety*) ought not to be bound beyond the scope of his engagement, which was to be answerable for the fidelity of Baird to Wright only, not to Wright and any other person or persons. When Wright took in a partner there was an end of the obligation; the condition is confined to Wright only, and the breach assigned is for non-payment of the money to Wright and Delafield, or either of them, which is not within the condition. The defendant Russell and the other surety might have confidence in Wright that he would be careful with respect to the conduct of Baird in his office of broad clerk; and for any thing that appears to the Court, the defendant Russell had no conception of being engaged for Baird's fidelity to any other person besides Wright."

95. In the case of *Barclay v. Lucas* there was a different

(a) 3 Wils. 530; S.C. 2 Bl. 934.

decision from the one just quoted, upon facts which to a great degree were similar, and, consequently, the two decisions have been considered antinomous. *Barclay v. Lucas* was an action upon a bond conditioned for the fidelity of P. Jones in the service of the obligees, as a clerk in their shop and counting-house. After the bond was given, the obligees, the plaintiffs, took into their house a new partner, and upon the pleadings it appeared, that the action was brought in respect of a breach of duty by Jones after the admission of the new partner. The Court, however, from the peculiar terms of the condition of this bond, thought the intention was that the defendant should be liable even in the event of a change in the partnership, and judgment was given for the plaintiffs.

"The question in this case," said Lord *Mansfield*, C.J. "turns upon the intention of the parties at the time of entering into the contract. In questions upon intention, we must look to the subject-matter of the contract. It is notorious, that there are many banking-houses in the city which continue for generations. This can only be done by a constant succession of partners; and even if they should not bear the same name with the first proprietors, yet still the house continues under the original firm. To carry on this business it is necessary to have a great number of clerks, whose office is extremely beneficial; for besides the presents, fees and emoluments, they are frequently taken into partnership in process of time. But it is of the utmost consequence to these houses that the clerks should behave honestly; and, therefore, a security is taken for their fidelity. The circumstance of taking in a new partner makes no difference either as to the quantity of business or the extent of the engagement. He continues to carry on the business of the plaintiffs; and this contract is co-extensive with his continuance in the house. This is a security to the house of the plaintiffs; and no change of partners will discharge the obligor. Thinking, as I do, upon the subject, I am very glad to find *there is a material distinction between this case and*

that in the Common Pleas. The defendant has objected that the present action is improperly brought, but I think that the plaintiffs are entitled to the whole sum embezzled, and if so they are clearly entitled to less (a). I am, therefore, of opinion, from the manifest intention of the parties, and from the clerk's continuing in the business notwithstanding one of the partners has been changed, that the plaintiffs are entitled to recover."

Willis, J. said, "The recital is very material, for it states that the service is to be performed *in the shop and counting-house* and *not to the plaintiffs*. The partners in a banking-house are perpetually changing; and where a number of clerks are employed, the inconvenience of demanding fresh securities from each upon every such change would be enormous. The introduction of a new partner does not increase the risk to the sureties; for a bond of this kind is an undertaking for the clerk's honesty."

96. It should be observed, that the reasoning of the Court in this case divides itself into two main arguments; one derived from the consideration of the peculiar terms of the condition or engagement under adjudication; the other general, and seemingly applicable to all surety bonds given to bankers. But from the subsequent cases I think it appears, that the first argument alone is valid; and consequently the only corollary of the decision, considered as extant law, is, that a surety bond may be so drawn as to continue in favour of the obligees after a change in their firm, or partnership; but that for it so to continue it must distinctly appear by its terms that such was the intention of the parties.

Thus in a recent case (b), where a joint and several promissory note payable on demand to order was given to bankers, as a security for advances from the payees to one

(a) The plaintiffs claimed only three-fourths of the sum which the clerk had embezzled, the remaining fourth being the share of the new partner.

(b) *Pease v. Hirst*, 10 B. & C. 122.

of the makers, it was held, that the note continued as a security for advances after a change in the firm of the payees, because it was made payable to order. "One objection," said *Bayley, J.* "is, that this being a note in which three out of the four defendants joined as sureties to a banking-house, (in which the plaintiffs and Harrison, deceased, were partners,) the liability of the defendants has ceased by the subsequent change in the firm. But a surety bond or instrument may be so framed as to comprehend future as well as present partners. Here, however, by the form of the instrument none of the parties have placed themselves in the condition of sureties. They appear on the face of the instrument to be principals, and not to have confined their liability to the then existing partners in the banking house, for *the note is made payable to them or order. It was evidently intended that it should continue from time to time* to such persons as afterwards constituted the members of the house."

97. The rule granted in *Roe d. Durant v. Moore* (a) may apparently be referred to as a subtle, if not just application, of the principle, that a surety's engagement is to be confined strictly to the persons to whom it is given. Moore, the tenant, being admitted to defend in the room of the casual ejector, put in sureties pursuant to the statute of the 1 Geo. 4, c. 87; but their recognizance was taken as in the action against the casual ejector. It was objected that the recognizance ought to have been taken as in the action against Moore, the tenant, because he and not the casual ejector would appear to be the defendant in the proceedings upon which the claim of the lessor of the plaintiff against the sureties would accrue. And accordingly the Court ordered the recognizance to be entitled in the cause of *Roe d. Durant v. Moore*, instead of *Roe d. Durant v. Doe*.

98. Upon the principle that a trade is not transmissible, but is put an end to by the death of the trader, Lord

(a) 6 Bing. 656.

Mansfield, C. J. adjudged, that a surety for the fidelity of a clerk was not liable in respect of a breach of trust upon an employment of the clerk by the trader's executors (a).

99. If a person engages as surety TO SEVERAL INDIVIDUALS, the engagement is understood to be to all of them collectively and jointly, and if any of them die it will not be available in respect of transactions afterwards by the survivors.

Thus in *Weston v. Barton* (b) the action was brought upon a bond in which the defendant was surety and the plaintiffs were obligees jointly with their deceased partner. The bond was conditioned to secure to the obligees (that is to the plaintiffs and their deceased partner) the repayment of all sums advanced by them or any of them in their capacity of bankers. The question was, whether the bond extended to sums advanced after the decease of one of the obligees; and the Court decided it did not. *Mansfield*, C. J. said, "the security was conditioned to pay any money advanced by them or any or either of them; and taking these last words by themselves it might at first be conceived, that if any one of the five advanced money this bond should secure it; but the words are afterwards explained, when it is seen that the money is to be paid to the five; for it could never be intended that money advanced by one of them singly should be repaid to the five, and this shows that the words 'advanced by them or any of them' must be confined in their meaning to money advanced by any of them in their capacity of bankers on behalf of all five."

100. So in *Strange v. Lee* (c), upon a bond given to the banking-house of Walwyn, Strange & Co., consisting at the time of six persons, and conditioned for B. Blyth's paying to them or either of them all sums from time to time advanced to him at the banking-house of the said Walwyn, Strange & Co. was held not to extend to advances after the death of one of them.

(a) *Barker v. Parker*, 1 T. R. (c) 3 East's R. 484.

(b) 4 Taunt. 673.

101. In *Myers v. Edge* (a) there was a similar decision upon the following common mercantile guarantie;

"Messrs. Myers, Fielden, Ainsworth & Co. If you please you may let the bearer, Thomas Duxbury, have six bunches of twist more than I told you, and I will be answerable for them as before: and after this I will be answerable for one pack and no more; so when he pays you for the first half pack you may let him have another, and so on till I tell you the contrary; and you may make the invoice to us both."

At the time when this engagement was entered into, Ainsworth was a partner in the same house with the plaintiffs, but the goods in question were furnished to Duxbury after he had retired from the partnership. *Rooke, J.* at the trial, considering the guarantie as given to the house and not to the individuals, refused to nonsuit the plaintiffs, upon the objection that the defendant was liable only for goods supplied whilst Ainsworth was a partner, and the plaintiffs had a verdict, but the Court granted a new trial. Lord *Kenyon, C. J.* said, "we are to judge on the contract the parties have made, and ought not to substitute another in lieu of it. Here the defendant contracted with *Myers, Fielden, Ainsworth & Co.* Perhaps the defendant had great confidence in *Ainsworth*, and thought that he would use due diligence in enforcing payment of the goods from Duxbury regularly as they were furnished: at least it is too much for us to say, that after Ainsworth ceased to be a partner, the defendant would have given the same credit to the remaining partners. If on a new trial the plaintiffs can produce any other evidence to affect the defendant, they will have an opportunity of doing so. But we cannot say, that a contract made with five ought to be construed to be a contract made with four only. I very much approve of the case cited from *Wilson*" (b).

Ashurst, J. "This is not a contract made with a cor-

(a) 7 T. R. 354.

(b) *Wright v. Russell*, ante, p. 75.

poration; it is made with a partnership consisting of a certain number of individuals; and when one of the partners left the business, it put an end to this engagement. After this alteration in the partnership, the plaintiff should have required a new undertaking." Mr. Justice *Grose* also remarked, that the engagement of defendant was directed to the partners' *nominatim*.

102. In *Metcalf v. Bruin (a)*, the bond on which the action was brought, was given to the plaintiffs as trustees of the Globe Insurance Company, to secure the fidelity of one Wilkinson during his continuance in the service of the company. The company was not a corporation; and many changes in its members having taken place, it was contended, that the bond was discharged; the Court, however, decided against the objection. "We must put upon the word company," said Lord *Ellenborough*, "the sense in which the parties themselves used it in this instrument. We could not, indeed, invert the rules of law to enable persons to sue as a body or company, who are not a corporation; but here the bond has been given to trustees, who are under no difficulty of suing upon it in their own name. The persons constituting the company laboured at the time under an imperfection to contract, from the fluctuating nature of their body, and, therefore, they constituted given persons to be trustees for them. These seven entered into this contract for the benefit of the company, and if it had not been understood that the company meant a fluctuating company, we must suppose they contemplated that the bond might, probably, be gone in twenty-four hours, which never could be meant. It must, therefore, have been intended to secure the faithful performance of the service to a succession of masters, who might, from time to time, constitute the company. Wilkinson then was admitted into the house of the Globe Insurance Company, the parties well knowing that a body so constituted would be continually changing; and they looked to his *continu-*

(a) 12 East's R. 399.

ance in the service of the said company; which could not mean a continuing service to the same individuals, some of whom might be changed before the wax on the bond was cold; but must have meant the successors of the persons so called the Globe Insurance Company. A contract with the body at large would not have done, but a contract with the trustees for the benefit of the body gets rid of all the difficulty."

103. But, an engagement entered into with persons as the representatives of a society, which at the time was a voluntary one, will not continue after the incorporation of the society.

In *Dance v. Girdler* (a), the defendants were the executors of Henry Capel, and were sued upon a bond which he had entered into jointly with Jesse Horwood, dated August, 1780. The bond was executed to the plaintiffs and several other persons deceased, who were described collectively as "Governors of the Society of Musicians" for the then present year, and it was made payable to them and their successors as governors of that society. The society was at that time a voluntary one; but was afterwards incorporated by letters-patent, under the name of the Royal Society of Musicians of Great Britain. It was recited, that Jesse was elected collector of the society on the 7th day of August, 1763, and the condition was for the defendant's accounting with the obligees and their successors, for all money which Jesse Horwood should receive by virtue of any order of the obligees, or their successors, as governors or otherwise, by virtue of his said election. The breach of duty for which the action was brought, occurred after the incorporation of the society. At the trial, Sir *James Mansfield*, C. J. thought that the not accounting with the governors of an incorporated society, was no breach of a condition to account with the governors of a society which was not incorporated, and, therefore, he nonsuited the plaintiff, and the Court

(a) 1 New Rep. 34.

confirmed the nonsuit. Upon the latter occasion, the learned Chief Justice said, "The principal defence set up in this case is, that the Society of Musicians, though it existed as a voluntary society at the time when the bond was given, was put an end to in the year 1790, when a charter was granted by the crown, not, as the plaintiffs contend, to that society, but to the several persons mentioned in the charter, who were at that time members of that society; that those persons were erected into a corporation perfectly different from the original society; that all obligation on the part of Capel, as surety for Jesse Horwood, ceased when the society itself ceased to exist; and that he, therefore, was not answerable for money received by Horwood as collector to the old society. The charter was accepted in 1790; from that time to this it has been acted upon, and there has been no meeting of the voluntary society which existed before the incorporation. The rights of the corporation are totally different from those of the society which existed when the bond was given. The bond itself is inaccurately drawn, being given to certain persons as governors of the society, and their successors. The intention, no doubt, was, that the bond should be payable to those who should succeed the obligees as governors. But this the law does not allow; and the bond can only be considered as given to the twelve obligees, and would ultimately have been payable to the representative of the last surviving obligee. The condition also proceeds upon the same idea. But, probably, it would not be deemed ineffectual on that account; and the condition would, perhaps, be construed to mean, that the collector should account to those persons who in future should happen to be governors. The charter grants that in future there shall be a perpetual society, called by the name of The Royal Society of Musicians of Great Britain, not that the society then existing shall be perpetual. This, therefore, is a new body, which never existed until the year 1790, from which time the voluntary society

ceased to exist; and if so, the surety is not bound to answer for money received by Horwood since that period. The contract entered into by a surety cannot be extended by any implication, but must take its effects according to the terms of it. Has the surety in the present case entered into any contract to be security in the present existing corporation for the fidelity of Jesse Horwood? Certainly not. There was no such corporation in contemplation in 1780. The only persons with whom he entered into any obligation were the twelve persons who are described as governors, and the condition goes no further than to provide that Horwood shall account to them and their successors. But Horwood cannot now account in the manner required by the bond, for no such persons exist. If the society is gone, the governors of that society are gone also. This seems to me to be a stronger case in favour of the surety than those which have been cited. For here there is no circumstance from which it can be inferred, that the parties considered the two societies as the same. Perhaps if Capel had been called upon, he might have entered into a new obligation. But the old obligation does not, in point of law, extend to the new corporation, and the surety has a right to avail himself of the objection."

104. There are cases, in great number, which involve no general principle, and cannot be brought under any general description, but which still must be noticed, on account of their importance to the practitioner, and the light they afford for the interpretation of like cases in future.

In *Pearsall v. Summersett* (a), which was an action upon a bond given to the plaintiffs as bankers, the question was, whether the bond extended only to past transactions, or to past and future also. The recital of the intent spoke only of past; the condition seemed to include both, but was uncertain. The Court held that past alone

(a) 4 Taunt. 593.

were included. The Court did not, however, rely wholly on the effect of the recital, but inferred, from the greater importance of the future transactions, that had it been intended to include them, no doubt of the intention would have been left on the face of the instrument; for the future, in comparison with the past, would have been the principal object of the engagement.

105. In *Parker v. Wise* (a) the condition of the bond recited that the obligees (the plaintiffs) were bankers, and S. and C. Wise paper-manufacturers; that the latter had overdrawn their account with the obligees 4882*l.*, and had applied for permission to overdraw such further sums as they should require, so as that the same, together with the 4882*l.*, should not exceed in the whole, at any one time, 5000*l.*; and the condition was for the payment by S. and C. Wise and the defendant (their surety) of the sum of 4882*l.*, and also such further sum as the obligees should thereafter advance to S. and C. W. in the course of their business, not exceeding in the whole 5000*l.*

For the defendant it was contended that the words "so as that the same should not exceed, &c., 5000*l.*," were a condition restrictive of the amount to be advanced to S. and C. W.; and that the defendant was discharged in consequence of the plaintiffs having advanced more than 5000*l.* (b); but the Court held the intention to be merely to restrict to the extent of 5000*l.*, the defendant's liability; and seemingly also the Court thought that the defendant would be liable for that amount, either composed partly of the previous debt of 4882*l.* or wholly of new advances.

106. In *Kirby v. The Duke of Marlborough* (c) this defendant joined in a bond as surety for one Coburn. In the condition there was a recital stating Coburn's having occasion for divers sums of money, not exceeding in the

(a) 6 M. & S. 239.

Rawlinson. See *post*, p. 87, n. (a), and overruled.

(b) A similar point was raised on slighter grounds in *Williams v.*

(c) 2 M. & S. 18.

whole the sum of 3000*l.*, and that he had applied to the plaintiffs to advance the same at such times and in such parts and proportions as he might require; and the condition was for the payment by Coburn and this defendant, or either of them, of all such sum or sums of money, not exceeding 3000*l.*, as the plaintiffs should at any time or times thereafter advance to Coburn. This, it was held, was not a continuing guarantie to the extent of 3000*l.* for advances made at any time, but only a guarantie for advances made to that extent. "It was the same," said Lord *Ellenborough*, "as if the surety had expressed that the bankers might lend to the amount of 3000*l.*; and when an advance was made to that amount the guarantie became *functus officio*, and was not a continuing guarantie."

107. A warrant of attorney with the following defeazance, "The within warrant of attorney is given to secure the payment of the sum of 4000*l.*, with lawful interest thereon" (a), was adjudged a continuing security, applicable to any future balance, notwithstanding intermediate payments by the debtor. In support of which decision the Court gave the following reasons:—That there was nothing on the face of the instrument to show that it was either intended to secure a balance existing at the time it was given, or that it should be discharged as soon as payments were made to the amount of 4000*l.*; that such was unlikely to be the intention, because, upon that supposition, the security would very soon cease, though it was obviously given with a view to the continuance of dealings between the parties. And the Court distinguished the case from the case of *Kirby v. The Duke of Marlborough* (b).

108. A bond conditioned to indemnify the obligees for such sums, not exceeding 5000*l.* in the whole, together

(a) *Woolley v. Jennings*, 7 Dowling & Ryland, 124; S. C. 5 B. & C. 165; *et* 2 Carrington & Payne, N. P. C. 144.

(b) *Ante*, p. 85, No. 106.

with interest, as in their banking business they should within ten years advance, or be liable to advance, on behalf of *A. B.*, was held to extend to the balance existing at the end of the period of ten years (a).

109. *Sansom v. Bell* (b) was an action upon a bond, in which the defendant suffered judgment by default, and an inquiry was taken before Lord *Ellenborough*, C. J. In the condition it was recited that the plaintiffs had agreed to accept bills, to be drawn on them by William Bell, to the amount of 10,000*l.*; that W. Bell was to remit good bills to the plaintiffs to answer their acceptances; that the defendant and Hugh Bell, to secure the plaintiffs against the acceptances, had agreed to join with W. Bell as his sureties. The condition was for the due payment of all such sums as W. Bell might thereafter owe the plaintiffs by reason of their acceptances for him, or *on any other account thereafter to subsist* between him and the plaintiffs.

The question was as to the effect of the words "on any other account thereafter to subsist;" the counsel for the defendant contending that they must be construed according to the recital, and therefore that the defendant was liable only for one series of acceptances to the amount of 10,000*l.*, and not for subsequent acceptances: But Lord *Ellenborough*, C. J. said, "Here, had the condition only referred to the acceptances mentioned in the recital, I should have thought the defendant liable for one set of bills accepted by the plaintiffs on account of W. Bell, and no more. But *a new subject-matter is afterwards introduced*; and the guarantie is extended to any other account thereafter to subsist between them, without any limitation of time, or restriction as to the nature of the transaction. An expanded liability is thus created. The inquiry must be taken for all such sums to the amount of 10,000*l.* as

(a) *Williams v. Rawlinson*, 10 71; *et 1 Ry. & Moo. N.P.C.* 233.
Moore & Payne, 362; *S. C.* 3 Bing. (b) 2 *Camp. N.P.C.* 39.

the plaintiffs can show to be on any account due to them from W. Bell." The words "any other account," therefore, were held to mean, not only any account for acceptances, but any account of any other kind or nature. Where, therefore, a condition contains a subject of agreement not mentioned in the recital, the condition with relation to that subject is not limited by the recital. The condition is restricted by the recital only where the subjects in both are the same, but expressed in the condition in terms more general or vague than in the recital.

110. In *The Irish Society v. Needham* (a), a bond with a condition that *A. B.* should pay over to the plaintiffs all rents which he should receive, and also the increase and improvements that should be made thereof by or upon any new contracts or renewals of the then leases, was held to extend to fines received by *A. B.* on the renewal of leases. According to which, a fine is an increase or improvement of a rent. Is it not more probable that by the latter terms improved rents were intended? The question, however, is simply one of interpretation, involving no principle peculiar to sureties, and is connected with the present subject only by the circumstance of the action being against a surety.

111. In common mercantile guaranties, which rarely contain any explanatory recital, the extent of liability intended by the parties is often a difficult question, and at the same time one for an arbitrary determination, as principles afford little aid in the interpretation of cases in which principles have in so very slight a degree influenced the construction or composition. The cases decided must be minutely studied, to learn the turn of mind which prevails in Court, where there is no fixed rule of decision.

112. In *Mason v. Pritchard* (b), a guarantie for *any* goods which the plaintiff had or should supply *A. B.* with to the extent of 100*l.*, was held to be an engagement to be answerable for goods to the extent of 100*l.* supplied at

(a) 1 Term R. 482.

(b) 12 East's R. 227.

any time afterwards. The guarantie, therefore, continued after payments by *A. B.* to more than the amount of 100*l.* Such general guaranties are called continuing ones.

113. Upon the following (*a*), "Gentlemen, I have been applied to by my brother, *W. W.*, jeweller, to be bound to you for any debts he may contract, not to exceed 100*l.*, (with you) for goods necessary in his business as a jeweller," &c., Lord *Ellenborough* said, "I think the defendant was answerable for any debt not exceeding 100*l.*, which *W. W.* might from time to time contract with the plaintiffs in the way of his business. The guarantie is not confined to one instance, but applies to debts successively renewed. If a party means to be surety only for a single dealing, he should take care to say so. By such an instrument as this a continuing suretyship is created to the specified amount."

114. So too upon the following (*b*): "I hereby undertake and engage to be answerable to the extent of 300*l.* for any tallow or soap supplied by Mr. Baston to France and Barnett:" &c., Lord *Ellenborough* said, "The defendant here became answerable for any soap or tallow supplied by the plaintiff to France and Barnett. Without the word *any*, it might, perhaps, have been confined to one dealing to the amount of 300*l.*; but as it is actually worded, I am of opinion it remained in force while the parties continued to deal on the footing established when it was given."

115. The following (*c*), "I do hereby agree to guarantee the payment of goods to be delivered in umbrellas and parasols to J. and E. A. Smee, according to the custom of their trading with you, in the sum of 200*l.*;" was held to be a continuing guarantie.

(*a*) *Male v. Wells*, 2 Camp. N.P.C. 413.

(*c*) *Hargreave v. Smee*, 6 Bing. 244; S.C. 3 Moore & Payne, 573.

(*b*) *Baston v. Bennett*, 3 Camp. N.P.C. 220.

116. On the other hand, an engagement to guarantee the payments of *A. M.* to the extent of 60% at quarterly account, bill at two months, for goods to be purchased by him of *W.* and *D. M.* (the plaintiffs), was held to apply only to one quarterly account (*a*). And therefore the three first quarterly accounts having been paid by *A. M.*, the defendant was held not liable in the present action for the fourth account.

117. So too the following (*b*): "I hereby agree to be answerable to Mr. Kay for the amount of five sacks of flour, to be delivered to Mr. W. Taylor, of Gray's Inn Road, payable in one month;" was held to be a guarantie for only the first five sacks supplied after the guarantie was given; and not to be a continuing guarantie for those which might be supplied subsequently.

118. If the engagement of surety is general, the surety is understood to be obliged to the same extent as the principal. Therefore, if the debt secured bears interest, the surety is liable for interest.

Thus, a receiver being liable to pay interest, his sureties are entitled to relief only upon payment of the debt and interest: although this rule is liable to exceptions, upon grounds of general equity, as in the case of *Dawson v. Raynes* (*c*), where the Lord Chancellor relieved the sureties without the payment of interest, because the parties interested neglected to take steps to compel their receiver to pass his accounts, although they had known for a considerable time he had become bankrupt.

119. As to costs, *Best*, C. J. in *Baker v. Garratt* (*d*), *arguendo*, said, "If a man becomes surety for a debtor, the creditor, in case the debtor fails, may recover the debt against the surety, but not the costs of a fruitless suit against the debtor, unless he has given notice of his

(*a*) *Melville v. Heyden*, 3 Barn. & Ald. 593.

S. C. 4 Carrington & Payne, N. P. C. 72.

(*b*) *Kay v. Groves*, 3 Moore & Payne, 634; *S. C.* 6 Bing. 276;

(*c*) 2 Russ. 466.
(*d*) 3 Bing. 56.

intention to sue;" which, as a general rule, seems reasonable.

In *Walker v. Wild*, however, the recognizance of a receiver having been estreated, an application by the sureties to have the proceedings against the receiver stayed, was granted only on condition of their paying the costs already incurred against the receiver. But this case is not within the principle of the rule above stated; for, the application being to the favour of the Court, could be granted only on such terms as would leave no ground for complaint to the opposite party; and, as a matter of right, sureties are not entitled to relief on more liberal terms than their principal; and the terms of relief in his case would be payment of the costs up to the time of granting the application.

120. In the case of a bond, be the condition ever so general, the obligor, whether surety or principal, is not liable beyond the penalty (a). In *Francis v. Wilson* (b), however, the plaintiff obtained an allowance of interest beyond the penalty; but the bond in that case was the exact amount of the sum mentioned in the condition; and there was an express stipulation for the payment of interest,—circumstances which evidently take it out of the rule respecting bonds, the penalty of which exceed the condition.

121. In *Clarke v. Abingdon* (c), the M. R. (Sir *William Grant*,) put a case in which he said the obligation of the surety would be more extensive than that of the principal debtor, as, "Where the principal gives a bond upon which interest is not usually recoverable at law, nor to be computed in equity, and a third person gives a mortgage to secure the same debt, interest is recoverable on the mortgage without limit." But, 1. Although one who

(a) *White v. Seely*, 2 Bl. R. 1190; (b) 1 Ryan & Moody, N. P. C.
Wilde v. Clarkson, 6 T. R. 303; 105.
 which latter case first overruled (c) 17 Ves. 109.
 the case of *Lord Lonsdale v. Church*,
 2 T. R. 388.

mortgages his own estate for the debt of another is, through the medium of his estate, a surety, and has in equity most of the rights of a surety, yet he is not such a surety as is contemplated by the definition of the contract of surety, or is distinctively a proper surety: and, 2. The principal, although not liable to the creditor for interest, is liable for it to the mortgagor; and therefore eventually the surety so called, or mortgagor more properly, is liable only to the same extent as the principal debtor.

CHAPTER V.

OF THE MANNER IN WHICH THE OBLIGATION OF THE SURETY MAY BE EXTINGUISHED.

122. The obligation of the surety may be extinguished in all the different ways in which any other kind of obligation may be extinguished; as, by payment or performance; by a release; by accord and satisfaction; by the bankruptcy and certificate of the surety; or by the adjudication of his discharge as an insolvent debtor; by the statute of limitations, if the obligation arises by simple contract; or by presumption from the lapse of time, called the presumptive bar, if it arises by specialty.

Of these several modes of discharge, the discharge by bankruptcy and discharge by the statute of limitations alone seem to require illustration with relation to the particular case of sureties.

Of Discharge by Bankruptcy.

123. The general rule is, that the certificate discharges the bankrupt from all debts proved, or which might have been proved, under the commission against him, and from such debts only. The principal question, therefore, to be considered here is, under what circumstances is the

creditor who holds a guarantie entitled to prove his debt under a commission against the surety?

124. By the fifty-first section of the statute 6 Geo. 4, c. 16, the present bankrupt act, debts payable at a future day may be proved, making a rebate for interest. The section is as follows:—

“ And be it enacted, that any person who shall have given credit to the bankrupt upon valuable consideration, for any money or other matter or thing whatsoever which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive at the rate of 5*l.* per cent., to be computed from the declaration of a dividend to the time such debt would have become payable according to the terms upon which it was contracted.”

125. In *Ex parte Adney* (a) the question was, whether the case came within the first section of the statute 7 Geo. 1, c. 31, of which the above section of the 6 Geo. 4, c. 16, is, with some slight alteration not affecting the present subject, a re-enactment. Adney guaranteed the payment of a promissory note, and became bankrupt before it was due. The Court of King's Bench thought it could not be proved as a debt under Adney's commission, because at the time the commission issued it rested in contingency whether the engagement would ever become a debt or not. The Court certified in these words:—“ Having heard counsel on both sides, and considered this case, we are of opinion, that, from the occasion of giving Adney's note, and the terms in which it is conceived, the parties intended it to be a collateral engagement only, in case Henshaw should not pay his note at the time it became due; and

(a) Cowp. 460.

therefore it rested in contingency at the time the commission issued against Adney, whether this engagement would ever become a debt or not; and consequently it could not be proved as such under Adney's commission."

126. In *Allsop v. Price* (a) the defendant and other persons joined J. S. T. Lawrence in a bond dated the 17th of June, 1772, with a condition, from the recital of which it appeared, that the obligees had advanced upon loan, for five years, 100*l.* to J. S. T. Lawrence; and the condition was, that J. S. T. Lawrence should pay interest half-yearly, and the principal sum within twenty days after the five years expired, and if he did so the bond should be void. The defendant pleaded his bankruptcy and certificate. The commission issued on the 5th of September, 1776, and the certificate was allowed on the 1st of May, 1777. The commission, therefore, issued before the expiration of the five years when the loan was to be repaid by Lawrence. The Court thought the plaintiffs entitled to recover. *Per Lord Mansfield, C. J.* "On the merits, we think that this was not a debt which could have been proved under the commission, for the defendant was not originally the debtor. It was not a debt to be paid by him *in futuro*, at all events, but depended on the acts of the principal, viz. whether he did or did not comply with the stipulations in the condition of the bond." The *postea* to the plaintiff.

To appreciate the effect of this decision, it is necessary to observe the peculiar nature of the condition of the bond. In most conditions of bonds given to secure the payment of money, all the obligors are placed under the same obligation; and the payment is conditioned to be made by them, or any or either of them. In such cases they are all principals. This condition, on the contrary, preserved the relations subsisting among the parties according to the real interest and transaction. The loan was to J. S. T. Lawrence; the condition, accordingly, was

(a) 1 Doug. 160.

only for payment by him in the first instance, and not for payment by him and the defendant and other obligors, or any or either of them. The case, therefore, was the same as if there had been separate bonds by J. S. T. Lawrence and his sureties, and the bond of the latter were conditioned for payment of the debt in case he should not pay it. And I may observe, that in this view the case of *Brooks v. S. and E. Lloyd* and the present, which have been considered as at variance, are really accordant. In that case the facts were as follow:—The defendant S. Lloyd, being arrested for a debt of his own of 54*l.*, the other defendant, E. Lloyd, to procure his discharge, joined him in a bond (and, it would seem, a warrant of attorney, though that is not stated by the reporter,) for the payment of the debt by instalments. Before the first instalment was due E. Lloyd became a bankrupt, and a commission issued, under which he obtained his certificate. Execution was afterwards issued against him on the bond. The present was a motion upon a rule to set aside the execution, on the ground that the debt might have been proved in virtue of the statute 7 Geo. 1, c. 31, s. 1; and the Court were of that opinion. “For,” said Lord *Mansfield*, C. J. “they (S. and E. Lloyd) are BOTH principals, and both are liable (in the first instance): the credit was given to the defendant Edward Lloyd as well as to Samuel Lloyd; and as under the statute the plaintiffs could have proved the bond under the commission, the rule (to set aside the execution) must be made absolute” (a). The case, therefore, according to the learned judge’s view of it, was one of credit given to the bankrupt upon a bond payable at a future day, and therefore clearly within the statute.

127. In like manner, in *Ex parte Gardom* (b), a case

(a) 1 Term R. 17. The marginal note to this case is, “A surety is within the meaning of the statute 7 Geo. 1, c. 31”; which by

implication obviously mis-states the effect of the decision.

(b) 15 Ves. 286. See also *Ex parte M^cMillan*, Buck, 288; and

in which, it appears, the debtor had become bankrupt as well as the surety, the Lord Chancellor held the debt could not be proved against the estate of the surety, because it was not due at the time the commission issued against the surety.

Per Lord Chancellor. "I think this claim (to prove against the surety's estate) cannot be sustained for the price of those goods as to which the credit had not expired; being under the word of 'guarantee' a contingent demand; therefore no debt arising until default made (by the principal). The distinction has been strongly taken upon bills of exchange. Upon a guarantie of a bill of exchange it has been held (*a*), that if the bill was not due until after the bankruptcy, proof cannot be made; and in one instance it was carried so far, that where the party had said he guaranteed the bill as if he had indorsed it, Lord *Thurlow* held, that being a mere guarantie it would not do: there would be no proof without actual indorsement.

128. In *Ex parte Minet* (*b*) the guarantie was to pay after one month's notice: and no notice having been given, the Lord Chancellor held the creditor not entitled to prove under the commission against the surety; and remarked that it fell directly within the authority of the case of *Utterson v. Vernon* (*c*).

129. In like manner, where (*d*) to an action against a surety in a bastardy bond the surety pleaded his bankruptcy and certificate, and it appeared that the sum claimed had been expended since his bankruptcy, it was held that the certificate was not a bar, because at the date of the commission the debt was upon a contingency; and it was a debt in its nature wholly incapable of valuation.

the note upon that case by Mr. Montague, in correction of the report, 1 Montague's Digest, p. 216, n: (*b*).

(*a*) *Ex parte Harrison*, 2 Bro. C. C. 614.

(*b*) 14 Ves. 189.

(*c*) 4 T. R. 570.

(*d*) *Overseers of St. Martin v. Warren*, 1 B. & A. 491. See Lord *Ellenborough's* judgment in this case, *post*, No. 134.

130. From the above cases, all of which were decided with reference to the first section of the statute 7 Geo. 1, c. 31, corresponding with the 51st section of the present bankrupt act, it appears that the creditor is not entitled, in virtue of the latter provision, to prove his debt under a commission against the surety, if at the time of the issuing of the commission the liability of the surety was still contingent; nor, indeed, if at the time of the issuing of the commission it had ceased to be contingent, the proof in that case being provided for by a different section (*a*).

131. But, although a person taking the security of a common guarantie does not give credit to the guarantor, in such a sense as brings the latter, in the event of his bankruptcy, within the operation of this section of the statute, yet a person taking a bill from the drawer is obviously a person giving credit upon a bill; and therefore proof may be made at any time against the drawer or indorser of a bill, although they are only sureties for the acceptor; and consequently, a drawer or indorser is discharged by his certificate, although the bill was not due when the commission issued, and there had been no previous default by the acceptor (or principal).

Thus, in *Starey v. Barns* (*b*), the defendant was sued as the drawer of a bill, and pleaded his bankruptcy and certificate; the bill was at two months, and dated the 15th of September, 1801; it had been accepted. The commission issued against the defendant on the 6th of November, 1801; and therefore the bill not being due at that time, and the defendant being liable upon it only in case of the default of the acceptor, it was urged, on behalf of the plaintiff, that the debt was not proveable, and the certificate not a bar to the action: and Lord *Ellenborough*, C. J., yielding to this view, directed a verdict for the plaintiff. But the Court made absolute a rule obtained for entering a nonsuit; and upon this occasion Lord *Ellenborough* said, "Upon referring to the act

(*a*) See *post*, 100.

(*b*) 7 East's R. 435.

of the 7 Geo. 1, c. 31, I think the plain letter of it is decisive of this question, without going upon any more uncertain ground. With all the respect which I feel for the opinion delivered in *Macarty v. Barrow* (a), that the mere drawing of a bill upon another, payable at a future time, creates a present debt from the drawer, recognized as it was by Lord C. J. *Wilmot* in *Chilton v. Whiffin*, I should have doubted whether the giving a credit upon another person at a future time, whereby the drawer virtually agrees, that if the drawee do not accept the bill he will pay it, constituted any thing else than a contingent future liability in the drawer upon the default of the drawee. However, I feel myself relieved from any difficulty upon the subject, upon the plain ground that the defendant is entitled to his discharge under the statute. After reciting that traders were often obliged to dispose of their goods on credit, and to take bills, &c. payable on future days, and that the buyers becoming bankrupts before the money upon such securities became payable, it had been a question whether such persons giving such credit on such security, should be let in to prove their debts before such securities became payable; for remedy it enacts, 'that every person who shall give credit on such securities as aforesaid,' (*here credit was given by the party on such a security,*) 'to any person who shall become a bankrupt,' (that is the case here,) 'upon good and valuable consideration for any sum of money, or other matter or thing whatsoever,' (an exchange of securities is a good consideration, according to *Cowley v. Dunlop* (b), and other cases,) 'which shall not be due or payable at or before the time of such person's becoming bankrupt,' (that is the fact of this case,) 'shall be admitted to prove their respective bills, &c. in like manner as if they were made payable presently, and not at a future day.' In every respect, therefore, the circumstances of this case tally with the description in the statute. Without, therefore,

(a) 2 Stra. 949; S. C. 3 Wils. 16.

(b) 7 Term R. 565.

admitting the principle that the drawing of such a bill constitutes a debitum in præsentī, it is sufficient to say, that by the express words of the statute the debt was proveable under the defendant's commission, and therefore he is discharged by his certificate" (a).

132. In *Gaskill v. Lindsay* (b) the defendants were sureties, by the common contract of guarantie, for whatever goods the plaintiffs should supply to David Irvine in his line of business from the 27th of July, 1809, to the 27th of July, 1810. The defendants pleaded their bankruptcy and certificate. The dealings between the plaintiffs and David Irvine were upon the usual terms of credit, a bill at two months at the end of two months after the goods were delivered. In the course of those dealings the plaintiffs received three bills drawn and accepted by other parties, but indorsed by the defendants: one of which bills became due and was dishonoured before the bankruptcy of the defendants; a second became due and was dishonoured, but the plaintiffs did not receive notice of the dishonour till after the bankruptcy of the defendants; and the third did not become due till six weeks after the commission. All three, however, it is evident, might have been proved under the commission. *Le Blanc*, J. was of opinion that the plaintiffs could not recover under the guarantie the sums for which the bills were given, inasmuch as the bills appeared to have been given in satisfaction of the guarantie.

In addition to the three bills it appeared that David Irvine was still indebted to the plaintiffs for a parcel of goods to the amount of 93*l.* 12*s.*, for which they had a right to call upon him for a bill at two months two days before the date of the defendants' commission, but no bill had in fact been demanded.

Le Blanc, J. thought this demand also was barred by the defendants' certificate. This opinion, however, it

(a) See also *Ex parte Douthat*, 4 B. & Ald. 67. (b) Holt, N. P. C. 212.

would seem, may be questioned; for as the debt, at the time the commission issued, *was* debitum in præsentī *solvendum in futuro* as to Irvine, it was only contingent as to the defendants.

133. The 56th section of the bankrupt act, which I shall next consider, provides for the proof of debts in two cases: first, when the debt is contingent; in which case the commissioners are empowered to value it, and the creditor may prove for the value: secondly, when, having been contingent, the contingency happens after the issuing of the commission; in which case the debt itself may be proved, a valuation being unnecessary. This section is as follows:

“ And be it enacted, that if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends, provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed.”

134. At present no case has occurred involving the question whether a creditor may be admitted, in virtue of this section, to prove under a guarantie whilst the liability of the surety is still contingent. The question, however, may perhaps be thought to derive some light from the decision, that, for a contingent debt to be proved, the contingency must be of a kind which is capable of

valuation. Thus, in a case (*a*) in which a debt dependent upon several contingencies was submitted for valuation to the actuaries of two life insurance offices, and they valued it with reference only to some of the contingencies, and said they had no data for the valuation of the others, the Lord Chancellor (*Brougham and Vaux*), assisted by *Tindal*, C. J. and Mr. Justice *Littledale*, reversing the order of the V. C., decided that the debt was not proveable. In another case also, where one of the contingencies on which the debt depended was the debtor's having issue by his marriage, and at the time proof of it was offered there was no issue, but the bankrupt's wife was still living, Lord *Lyndhurst*, Ch., reversing the order of the V. C., decided the debt was not proveable under the 56th section. "My judgment is founded on a consideration that in this case the contingencies are incapable of a valuation by the commissioners. They would be bound to ascertain the sum to be proved by a correct estimate of all the different contingencies; but as they are not capable of valuation, I think the claim does not fall within the relief intended by the clause of the statute applicable to contingent debts. The decision of the Vice-Chancellor must, therefore, be reversed."

The consequence of these decisions would seem to be, that a debt cannot be proved under a guarantie whilst the liability of the surety is contingent; because the contingency of the debtor's making default is obviously one for the valuation of which there are no data.

135. The remarks of Lord *Ellenborough*, in his judgment upon the case of the *Overseers of St. Martin v. Warren* (*b*), are rather relevant to a provision for the proof of contingent debts, than to any provision at that time existing, and they seem to determine by anticipation that such a case would not be within the 56th section. "This,"

(*a*) *Ex parte Davis*, 1 Mon. (in the press.) (*b*) *Ante*, p. 96, n. (*d*).

said the learned Chief Justice, " was a debt upon a contingency, and one too in its nature incapable of valuation, and therefore (a), in my opinion, not proveable under the commission. The case of an annuity is an exception to the general rule; there, indeed, the Courts have admitted the amount of the contingent debt to be valued and proved; but there, you only estimate the duration of life; here, the expenses for which the party is liable may vary in consequence of the sickness of the child: the contingency here is, not only the duration of life, but on the continuance of health; it is subjected to every accident of human life, and is a most precarious and uncertain event possible; how then could its value be estimated so as to be proved under the commission?"

136. The case of *Ex parte Lewis* (b) was decided under the latter part of the 56th section. The petition stated that Cauty advanced to Collier 2000*l.* to be repaid on the 29th of June, 1826; that Charman gave a bond conditioned, that in case Collier should make default in payment on the 29th of June, 1826, he, Charman, should pay within one week afterwards; that on the 16th of May, 1826, a commission issued against Charman; that default was made by Collier on the 29th of June, and proof of the debt was then offered under Charman's commission, but was rejected, because the debt was contingent when the commission issued. The Vice-Chancellor ordered the proof to be admitted, according to the prayer of the petition. In support of the petition, *Ex parte Grundy* (c) was referred to; which case was as follows:—In February, 1772, Russell, by marriage settlement, covenanted to pay 2000*l.* upon the event of his intended wife, or any issue of the marriage, surviving him. In 1803 a commission issued

(a) It would seem from this that contingent debts were proveable at this time, if they were capable of valuation; but the fact is not so.

(b) 1 Mon. & Mac. 426.

(c) Ibid. 293.

against him; he died in February, 1825; in 1828 the commission was revived; and the Lord Chancellor, reversing a decision of the Vice-Chancellor, ordered proof of the debt to be received under the commission, and said, "The commissioners are not required, nor is it necessary for them to set a value upon a contingency which has happened. On the occurrence of the contingency the sum to be proved is known, and the proof is expressly provided for by the words which follow:—'Or if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt, and receive dividends with the other creditors, not disturbing any former dividends.'"

137. In *Yallop v. Ebers* (a), the first count of the declaration was upon a promise of the defendant that he would settle the balance due upon a bill of exchange for 804*l.* then in the hands of Messrs. Chambers, of which the plaintiff was the acceptor: the second count was upon a promise of the defendant that he would deliver up the same bill to the plaintiff in one month, or give a bond for the indemnification of the plaintiff against it: and in each count it was alleged, that in consequence of the non-performance of the promise, the assignees of Messrs. Chambers had sued the plaintiff, and he was himself obliged to pay the balance of the bill and the costs of the action.

The defendant pleaded his bankruptcy and certificate.

It appeared that the promise stated in the first count was made in January, 1825, and that in the second count was made in consequence of the defendant not having paid the balance of the bill according to the first promise: it also appeared that in July, 1827, the assignees of Messrs. Chambers obtained a verdict on the bill for 527*l.*, and,

(a) 1 B. & Adol. 698.

pending a rule nisi for a new trial, Ebers, the present defendant, became bankrupt, and obtained his certificate; after which, the plaintiff, having failed to obtain a new trial, paid the sum recovered against him and costs. Upon these facts Lord *Tenterden*, C. J. directed a verdict to be found for the plaintiff, with leave to the defendant to move to enter a nonsuit, one of the grounds for which was the bankruptcy of the defendant, as above stated; and upon the motion it was argued for the defendant, either that this was an absolute debt within the 51st section, or a contingent debt within the 56th section; or that the plaintiff was a surety within the meaning of the 52d section; but the Court refused the rule for a nonsuit.

Per Lord *Tenterden*, C. J.—“ I am of opinion that we ought not to grant the rule. The discharge from debts under the bankrupt act is entirely the creature of that act; it can only take place in the particular instances there specified. By the statute 6 Geo. 4, c. 16, a bankrupt may be discharged from all debts due at the time of issuing the commission, all that are certain to become due at a future time, and all that may or may not become payable by the bankrupt at a future time; in the latter case, where the contingency has not happened before the issuing of the commission, the commissioners, on application from the party with whom the debt has been contracted, may ascertain its value and admit the party to prove; or, if the contingency has happened before the value is ascertained, the demand then stands as if it had been debitum in præsentī solvendum in futuro, and the creditor may prove in respect of such debt, and receive dividends, only not disturbing former ones. But it appears to me that there was no debt between the present defendant and the plaintiff to which any of these clauses could be applicable. Then it is suggested, that by the arrangement between these parties Yallop the acceptor became only a surety, and Ebers was then the principal, and therefore Yallop

might have come in as a creditor under the commission. But it cannot be maintained that if *A.* is principal and *B.* surety, their situation in that respect can be changed with reference to *C.* by an arrangement to which he is no party. *Laxton v. Peat* (a), where it was held that an accommodation acceptor might be considered as a surety, has been long overruled. I think then that the defendant's bankruptcy was no discharge."

Littledale, J. said, no debt can be said to have subsisted between the plaintiff and the defendant before the certificate.

Taunton, J.—"Section 56 applies only where the bankrupt becomes liable on a contingency; where, on the occurrence of particular circumstances which are uncertain, responsibility attaches to him. But here the liability of the defendant to pay the plaintiff attached immediately on the plaintiff's taking the bill up; and before that time the defendant had not contracted any debt with the plaintiff payable upon a contingency, according to this section of the statute. Could the plaintiff then have come in under the general clause (sect. 46) as a creditor to prove this demand on oath? He was clearly not in the condition of a creditor till after he had taken up the bill, by which time the bankrupt had obtained his certificate."

138. In *Ex parte Hughes* (b), Emmett being indebted to Hughes, but the amount of the debt being disputed, one Garnett, an attorney, undertook in writing that Emmett should enter into an unqualified reference, which reference was not to be revocable. The master reported that Garnett was liable under the "guarantie," unless the Court thought he was discharged under the following circumstances:—Hughes, without the consent of Garnett, proved a debt of £100/. under a second commission against Emmett, and at the same time reserved a claim for a further sum against Emmett's separate estate; in proving, he excepted the undertaking of Garnett. Hughes also tendered

(a) See *post*.

(b) 5 B. & Ald. 482.

proof of a debt of 249*l.* 15*s.* 3*d.* against Emett as partner with one Monkhouse, also excepting the guarantie of Garnett, but the proof was objected to by Garnett, as solicitor of the commission, as being a joint proof. The undertaking of Garnett was given after the date of the first, and before the date of the second commission.

Per Curiam. "It was the duty of Garnett to have paid the debt before the proof of Hughes under the bankruptcy, or, at all events, to have given Hughes notice not to prove, if he thought that would be a disadvantage to himself. If, therefore, any inconvenience arises to him in respect of the proof made by Hughes, his own neglect was the cause of it. Here, Hughes had Emett for his debtor, and Garnett as his surety, and he, therefore, had a full right to prove under Emett's commission. Besides, the legislature considers the proof against the principal as a benefit to the surety by relieving him *pro tanto*." Accordingly Garnett was held liable. The argument in favour of Garnett seems to have been, that a reference as to the amount of the debt was a condition precedent to his liability, and that as Hughes dispensed with the reference, by proving under the commission, Garnett was not liable.

139. The 58th section of the bankrupt act permits, in certain cases, the proof of costs which were not taxed at the time of the bankruptcy. Previously, such costs were not proveable, yet they were held to be barred by the certificate, if the debt itself for which they were incurred was proveable; for, being regarded as accessory, they followed the principal: and the same decision, it seems, would take place still in any case of costs in respect of a proveable debt, which might happen not to be within the 58th section. The section is as follows:—

"And be it enacted, that if any plaintiff in any action at law, or suit in equity, or petitioner in bankruptcy or lunacy, shall have obtained any judgment, decree, or order, against any person who shall thereafter become bankrupt, for any debt or demand in respect of which

such plaintiff or petitioner shall prove under the commission, such plaintiff or petitioner shall also be entitled to prove for the costs which he shall have incurred in obtaining the same, although such costs shall not have been taxed at the time of the bankruptcy."

In *Brind v. Bacon*(a), the testimony of a person who had guaranteed a bill, and become bankrupt, was objected to, on the ground that although he was discharged as to the bill, he continued liable for the costs of any action that might be brought upon it; but *Mansfield*, C. J. and *Heath*, J. "agreed that the costs must follow the debt, and that it was impossible to separate them."

140. For a demand to be proveable it must be such as is properly called a debt; and therefore a demand upon the bankrupt for compensation, in the nature of unliquidated damages, is not proveable.

In *Atwood v. Partridge*(b), the defendant covenanted for the due payment, by one Robinson, of the premium of a life insurance effected by Robinson, to secure a debt due from him to the plaintiff. One year's premium became due on the 17th of June, and not being paid either by him or the defendant, the plaintiff paid it, and brought an action on the covenant. On the 20th of June, the defendant obtained his certificate, and pleaded it in bar of the present action upon the covenant; but the Court held it not a bar, on the ground, that the subject of the plaintiff's demand was not a debt, but unliquidated damages. "What," said *Best*, C. J., "are the circumstances of the case? Robinson owes the plaintiff money. The defendant does not become a surety for that debt; but Robinson having agreed, by way of security, to pay the premium upon a policy of insurance, the defendant undertakes to guarantee, not the payment of Robinson's debt to the plaintiff, but of that premium. There was, therefore, no debt due from the defendant to the plaintiff, contingent or

(a) 5 Taunt. 183.

(b) 4 Bing. 209. See also *Boorman v. Nash*, 9 B. & C. 145.

otherwise. Upon Robinson's failing to pay the premium the plaintiffs were entitled to recover from the defendant unliquidated damages, the amount of which might be varied according to circumstances. If Robinson continued alive, as was found by the jury, the amount would have been the premium paid by the plaintiff. If Robinson had died, it might have been the whole sum insured. How is it possible, then, to say that this was a debt due from the defendant?"

Gaselee, J. said, "This was not a debt proveable under the 56th section of the 6 Geo. 4, c. 16, but a mere claim for unliquidated damages, from which the defendant was not discharged by his certificate."

141. With respect to sureties for the payment of any annuity, the 55th section of the bankrupt act (6 Geo. 4, c. 16,) contains the following enactment:—

"That it shall not be lawful for any person entitled to any annuity granted by any bankrupt, to sue any person who may be collateral surety for the payment of such annuity, until such annuitant shall have proved under the commission against such bankrupt for the value of such annuity, and for the payment thereof; and if such surety, after such proof, pay the amount proved as aforesaid, he shall be thereby discharged from all claims in respect of such annuity; and if such surety shall not (before any payment of the said annuity subsequent to the bankruptcy shall have become due) pay the sum so proved as aforesaid, he may be sued for the accruing payments of such annuity, until such annuitant shall have been paid or satisfied the amount so proved (a), with interest thereon at the rate of four per cent. per annum, from the time of notice of such proof, and of the amount thereof being given to such surety; and after such payment or satisfaction, such surety shall stand in the place of such annuitant in respect of such proof as aforesaid, to the amount so paid or satis-

(a) This provision accords with *bre*, in *Baxter v. Nichols*, 4 Taunt. a suggestion of Mr. Justice *Cham-* 90.

fied as aforesaid by such surety; and the certificate of the bankrupt shall be a discharge to him from all claims of such annuitant, or of such surety in respect of such annuity; provided such surety shall be entitled to credit in account with such annuitant for any dividends received by such annuitant under the commission before such surety shall have fully paid or satisfied the amount so proved as aforesaid (a)."

142. In *Bell v. Bilton* (b), the Court of Common Pleas held that the clause of this section, directing that the grantee shall not sue the surety till he has proved under the commission, is retrospective, and applies to annuities granted before, and the grantors of which have become bankrupt before the 1st of September, 1825, the day the act came into operation.

143. In *Hone v. Morgan* (c), it appeared that on the 1st of April, 1825, the plaintiff, the grantee of an annuity, had entered up judgment on a warrant of attorney against the grantor and his surety; that in June, 1827, the grantor became bankrupt, and the grantee did not prove under the commission, but caused execution to be levied upon the goods of the surety. On behalf of the surety a rule was obtained to set aside the execution, and it was made absolute, the Court considering that to take out execution is a *suit* or suing within the meaning of the above section.

144. If the principal has made default before the commission issued against the surety, the creditor, it seems, is entitled to prove his debt, in virtue of the general sections relating to the proof of debts, (the 46th and 47th); and in such a case the surety, of course, is discharged; and any questions respecting his discharge are the same, and are governed by the same reasons and authorities as if he were a principal debtor.

(a) The Insolvent Debtors' Act, 7 Geo. 4, c. 57, contains a provision (sect. 51) for the valuation of annuities, but not one similar to the above in favour of sureties.

(b) 4 Bing. 615; S. C. 1 Moore & Payne, 594.

(c) 4 Manning & Ryland, 559.

Of Discharge by the Statute of Limitations.

145. By the statute of limitations (*a*), the actions therein mentioned (which include the action upon the contract of guarantie) must be brought within six years next after the cause of action. The cause of action is the obligation raised by the contract, and the breach of the contract. The statutory time, therefore, is reckoned, not from the date of the contract, but from the period at which the obligation created by it becomes absolute: which, for example, in the case of a promissory note or bill of exchange, is when the note or bill becomes due; and in the case of a guarantie, in general, is when the principal makes default, and the surety first becomes liable to an action. And, therefore, a plea of the statute should state that the plaintiff's cause of action did not accrue within six years; and a plea merely that the defendant's promise (or contract) was not made within that period is bad, if demurred to.

The common replication, that the plaintiff sued out a writ within the period of six years is an answer to a plea of the statute; in other words, proof of that fact deprives the defendant of the effect of the statute; and so will an acknowledgment of the debt or liability, made by the surety within six years; but it must be an acknowledgment in writing; though previously to the act of the 9th Geo. 4, c. 14, a verbal acknowledgment (*b*) was sufficient.

146. A payment on account within six years has, in general, the same effect as an acknowledgment, and deprives the party making it of the benefit of the statute. Would a payment on account by the principal deprive the surety of the benefit of the statute? To this question, I can only give an answer derived from the analogy of other cases; and for the perception of this analogy, first the nature of the surety's contract must be considered.

(*a*) 21 Jac. 1, c. 16.

(*b*) *Gibbons v. M'Casland*, 1 B. & Ald. 690.

The contract of a surety, properly so called, and that of his principal, are, with relation to one another, separate or several contracts. The surety is not engaged jointly with his principal, but only contemporaneously or concurrently.

In *Burleigh v. Stott* (a), to an action on the joint and several promissory note of two persons, brought by the payee against the administrator of one of them, who joined in the note merely for the accommodation of the other, and whom the report therefore calls "a mere surety," the defendant pleaded, that the causes of action did not accrue within six years; on which issue was taken. The plaintiff proved that within six years, and during the life-time of the deceased party, the other party made a payment on account, and it was held that the payment took the case out of the statute as against both parties. The note was dated the 4th of March, 1818; the action was commenced on the 3d of October, 1826; the last payment was made on the 10th of October, 1820, at which time both the parties to the note were living; and therefore it appears that the payment was made whilst the liability or contract continued joint. But the death of one of two joint contractors severs the liability; and in a recent case (b), where the facts were the same as in the above, excepting that the payment was made after the death of one of the parties by the executrix of such party, it was held that the payment did not deprive the other party of his plea under the statute. "We think," said Lord *Tenterden*, C. J. "that where a joint contract is severed by the death of one of the contractors, nothing can be done by the personal representatives of the other to take the debt out of the statute as against the survivor." Nor, according to *Atkins*

(a) 2 Manning & Ryland, 93; S. C. 8 B. & C. 36.

(b) *Slater v. Lawson*, 1 B. & Adol. 396. In this case the note was dated 27th of September, 1810, signed by the defendant and James

Warwick, deceased. The action was tried in 1830, and the payment relied upon to take the case out of the statute was made by Warwick's executrix within four years from the commencement of the action.

v. *Tredgold* (a), by one of the parties to take the debt out of the statute as against the representative of the other party.

(a) 3 Dowling & Ryland, 200; S. C. 2 B. & C. 23. In this case there were three notes, two dated 17th January, 1806, the third 17th January, 1809; the makers were John Tredgold, deceased, and his son Robert Tredgold; the action was against the executors of the former, of whom Robert Tredgold was one; John Tredgold died in 1810, which was more than six years before the action was brought; and after his death Robert Tredgold paid one year's interest on all the notes. The declaration contained counts upon promises by the executors. The judgment of *Abbott, C. J.* was as follows:—“The plaintiffs have declared in several counts on three promissory notes alleged to have been made by John Tredgold in his life-time; and in another count, in the usual form, that John Tredgold, in his life-time, promised to pay the same notes. To that part of the declaration there is a plea, that John Tredgold never promised to pay within six years. It appears, in fact, that he had been dead greatly more than six years before the action was commenced. It is clear, therefore, that no promise could have been made by him to support this action, and consequently those counts must be put out of the question. Then another count, upon which the plaintiffs rely, alleges, in substance, that John Tredgold in

his life-time had made these promissory notes, whereby he became liable to pay John Atkins, whose representatives the plaintiffs are, certain sums of money; that he died leaving those sums unpaid; that the defendants, as his executors, had knowledge of that fact, and in consideration thereof promised to pay. The question is, whether there has been evidence given in this case of a promise by the executors, *quà* executors. Now I cannot accede to the argument, that the mere existence of a debt owing by a testator is of itself evidence of a promise by the executor to pay it. We must, therefore, seek for evidence elsewhere of a promise by the executors: I, however, can find none. The only evidence is, that Robert Tredgold, who is one of the defendants and one of the executors, and who was himself a joint maker, did in the year 1816 pay a year's interest on the notes. The jury found that he paid the interest not as executor, but in his own right; that fact was proved in evidence: then as there is nothing to bind the defendants in the character of executors, I own I should feel great difficulty in saying, independently of the statute of limitations, that the plaintiffs had made out their case. But the defendants further plead that they did not promise within six years; and, going back to what I origi-

As, therefore, after the severance of a joint liability, a payment by one of the joint parties, or his representative, cannot affect the other, à fortiori, where the liability was originally several, it would seem, a payment by one of the several parties cannot affect the other; and, according to this analogy, the question proposed, whether a payment by the principal will deprive the surety of the benefit of the statute, must be answered in the negative. Upon the same principle, an acknowledgment by the principal would not prevent the operation of the statute in favour of the surety.

147. The statute extends only to obligations arising by simple contract. But the Courts have created a presumptive bar in favour of persons who are obliged by specialty. This bar, called presumptive, because it is founded on the presumption, arising from lapse of time, that an obligation which has been allowed to be dormant long has been satisfied, takes place where twenty years, or thereabouts, have elapsed before the action was brought, and no evidence is offered to prove the continuance of the obligation within that period.

The character of the presumptive bar is described by Lord *Mansfield* in the following passage (a):—"There is a great difference between length of time, which operates as a bar to a claim, and that which is only used by way of evidence; a jury is concluded by length of time that oper-

nally said, if reliance is placed upon the existence of the debt at the death of the testator as evidence of a promise by the executors, still the statute of limitations is a valid defence, the testator having died ten years since. The question then is, whether the payment by Robert Tredgold of interest upon the notes in his own right, and not as executor, affords evidence of a promise binding on his

co-executors. I think it does not afford evidence of a promise by them to pay at any time; but at all events I am quite clear it does not take the case out of the statute of limitations."

(a) *Mayor of Kingston upon Hull v. Horner*, Cowp. R. 102. See also *Oswald v. Legh*, 1 Term R. 270; *Colell v. Budd*, 1 Camp. N. P. C. 27.

ates as a bar; as where the statute of limitations is pleaded in bar to a debt; though the jury is satisfied that the debt is due and unpaid it is still a bar; but length of time used merely by way of evidence, may be left to the consideration of the jury, to be credited or not, and to draw their inference one way or the other, according to circumstances. For instance, there is no statute of limitations that bars an action upon a bond, but there is a time when a jury may presume the debt to be discharged; as where no interest appears to have been paid for sixteen years. But if a witness is produced to prove the contrary, as by shewing the party not to have been in circumstances to pay (a), or a recent acknowledgment of the debt, the jury must say the contrary."

Of the Surety's Discharge by Modes which derive their Effect from the Nature of the Contract of Surety.

148. The obligation of the surety also, in general, becomes extinct, by the extinction of the obligation of the principal debtor (b). An exception to this rule takes place, whenever the extinction of the obligation of the principal arises from causes, such as bankruptcy and certificate, which originate with the law (c), and not in the voluntary acts of the creditor.

149. In conformity with the above rule, the obligation of the surety is extinguished, if the creditor agrees to accept a composition from the debtor; and, therefore, after such an agreement, in general, he cannot proceed against the surety. Thus, in *Jones v. Lewis* (d), the de-

(a) *Contrà*, *Willaine v. Gorges*, 1 Camp. N. P. C. 217.

(b) See *antè*, p. 3, No. 5.

(c) See *post*, *Brown v. Carr*.

(d) 4 Barn. & Cres. 506. This case is strictly in point, because the defendant was a surety, not

merely in the lax sense in which the one of two joint makers, who has lent his name for the use of the other, is said to be a surety; but as an indorser he was properly a surety for the maker.

fendant was sued on a promissory note, which he had indorsed for the accommodation of the maker. The indorser of a note is a surety for the maker. The plaintiff, to whom the note was indorsed, agreed with the maker to accept five shillings in the pound for the debt for which the note was given, and the composition was to be secured by a third person. By this agreement the original debt was extinguished; and therefore it was held, that the defendant was not liable. "Although," said Mr. Justice *Holroyd*, "this be a case where the action is brought against a surety, it must be considered in the same light as if it was brought against the principal. If the original debt be satisfied and gone, no action will lie against the surety. The extinguishment of the debt puts an end to the agreement of the principal and surety."

150. Upon the same principle also the surety is discharged, at law, by the creditor's releasing, or, in equity, by his agreeing to release, the principal debtor.

Thus, in *Hawkshaw v. Perkins* (a), the bill stated, in substance, that the plaintiff and Daniel Rencher had executed to the defendants a joint and several bond, in the penalty of 500*l.*, to secure to the defendants half that sum, upon their dealings in the coal trade with Rencher. The plaintiff, therefore, was surety for Rencher. The bill then stated that Rencher having become embarrassed, the defendants and his other creditors agreed to accept from him an assignment of his property, and in consideration thereof to release him from their several demands; that a deed of assignment was executed, to which the defendants were parties, and which contained a release of Rencher: as to the validity of which, however, quà a release, as far as the defendants were concerned, there was some question, which will be noticed presently. To the bill there was a general demurrer, and, after argument, the Lord Chancellor held, that whether the release

(a) 2 Swanst. 539.

was valid or not, the agreement to execute a release discharged the surety.

Per the Lord Chancellor.—“The case was argued before me on the question whether this was a valid legal release; but without adverting to that question, and supposing that it would not be valid at law, still the bill has charged that the defendants agreed to execute a release, and that an assignment was made in performance of that agreement; that will sustain the agreement in equity, if not in a Court of law. It was contended that the plaintiff could not support this bill if he had a legal defence. I cannot accede to that argument. It has always been held here, that time given to the principal releases the surety; the recent adoption of that doctrine by Courts of law will not exclude the concurrent jurisdiction of this Court. Another circumstance is, that the bill prays relief which cannot be obtained at law, the delivery of the bond to be cancelled. I am, therefore, of opinion that the demurrer must be overruled.”

The release was executed only by one of the defendants, and the question as to its validity was, whether one partner could execute a release to bind his co-partners. With reference to which point the Lord Chancellor said, “When a bond is prepared as the joint bond of two persons, though formerly if executed by one only, being intended to be executed by both, it was considered as the bond of neither, it has been lately and repeatedly held (a) to be the bond of him who executed it. The question then will be, whether the release, if not valid against both the parties, is valid against one; if so, the parties are right in coming

(a) For example, in *Elliott v. Davis*, 2 Bos. & Pul. 338, where the defendant had executed a surety-bond in the joint names of himself and his partner, the bond was held not good as a joint bond; but Lord *Eldon*, C. J. said, that as the defendant had no authority to

bind his partner, the bond was the several bond of himself; and if necessary the Court (C. P.) would hold him to have described himself by the name of “T. Davis and G. Marsh,” and to be estopped from shewing that his name was T. Davis only.

into equity, because the release, though not good against both, changes the nature of the property" (a).

In this case, the bond being the joint bond of the principal and surety, the release, supposing it valid *quà* a release, would have been a defence at law for the latter, not however *quà* surety, but *quà* joint debtor; because a release extinguishes the debt, and totally puts an end to the claim of the creditor: but a release of one of several who are obliged for the same debt, not jointly but only severally, is, I conceive, available in favour of the surety only in equity.

151. At law, if several persons are obliged under seal, and appear, by the terms of their engagement, to be principals, they are estopped from proving themselves to be essentially sureties; and, therefore, even such as are essentially only sureties, cannot, at law, use in defence matter which might entitle them to relief, either partial or entire, in equity, where there is no estoppel, but they are permitted to prove themselves sureties.

In *Collins v. Prosser* (b), the defendants were sued as the executors of G. S. Wegg, Esq. upon a bond executed by him and several other persons as sureties for G. B. Mainwaring, receiver for the county of Middlesex. The

(a) The Lord Chancellor put to the bar the question, whether, if two partners have a demand against a principal and surety by bond, and one, professing to act for the other as well as himself, signs, seals, and delivers a release, that release is valid against himself if void against his partner? To which the Solicitor General, as *amicus curiæ*, replied, that he had never known the point occur in practice, but thought the release might be pleaded; that a deed amounting to a mere acceptance of terms of composition, executed by one partner, is not binding on the rest, but that

a release so executed binds all, the release of a *joint obligation* being at law an extinguishment of the debt. The learned Solicitor's reason, however, is not in point; for the question was not whether the release of one of several joint debtors from the "joint obligation" would extinguish the obligation so as to operate as a release of all the debtors, but whether the release of a joint right by one only of the parties to whom the right jointly belonged, operated as a release *by* all of them.

(b) 3 D. & R. 112; S. C. 1 B. & C. 682.

bond, as appeared upon oyer, was drawn in the following manner:—After expressing that J. G. B. Mainwaring was bound for the sum of 12,000*l.*, it proceeded, and I, E. W. am held and firmly bound in the sum of 3000*l.* for which I bind myself &c.; and we, P. P., S. J., and W. E., are also held and firmly bound in 2000*l.* each, for which we bind ourselves, and each of us for himself, for the whole and entire sum of 2000*l.* each; and we, Sir N. C., G. S. Wegg (the testator), and J. W. are also held and firmly bound in 1000*l.* each, for which we bind ourselves, and each of us for himself, for the whole and entire sum of 1000*l.* each. The condition recited, that the several parties had agreed to become surety for Mainwaring for the several sums set opposite to their names, and the condition was for Mainwaring's accounting. The defence was, that the seal of Sir N. C. had been taken off the bond without the privity or consent either of Wegg or the defendants, and with the consent of the plaintiffs; and in support of this defence two arguments were urged, first, that the bond was the joint bond of Sir N. C. Wegg and of J. W. for 1000*l.*, and that taking off the seal of Sir N. C., one of the joint obligors, operated as a release, and extinguished the liability of all of them; but the Court held the bond to be several: and secondly it was argued, that by the removal of Sir N. C.'s seal the defendants were deprived of their claim of contribution against him (a): but Mr. Justice Bayley said, "Whether Mr. Wegg's executors would have any remedy against Sir Nathaniel Conant for contribution, is not properly a question for our consideration. If they have sustained any prejudice by the removal of Sir Nathaniel Conant's seal, they may obtain relief in equity; but I am of opinion, that this being a several bond, that act does not avoid the bond, nor afford any answer at law to the action." Judgment for the plaintiff.

152. The surety is discharged if, without his consent, the principal parties make a new agreement inconsistent with

(a) Whether this is a ground for relief in equity will be considered hereafter.

the terms of the original agreement, or if they agree to make any alteration either in the terms of the original agreement, or in the mode of performing them. ' Thus in *Whitcher v. Hall* (a) the declaration stated, that by a special agreement between the plaintiff of the one part, and Joseph Hall as principal, and the defendant as his surety, of the other part, the plaintiff was to let, and Joseph Hall take, the milking of thirty cows, at a certain rent per cow, from the 14th of February following; and the plaintiff averred performance of this agreement. The evidence was, that on the 14th of February Joseph Hall took possession of the dairy of thirty cows, only ten of which were fit for milking; that at Lady-day the plaintiff put two more milking cows into the dairy, making thirty-two; and subsequently the plaintiff and Joseph Hall exchanged cows from time to time, the plaintiff putting in those fit for milking, and taking out others which were not so; in May Joseph Hall had thirty-two cows, and he agreed that the plaintiff, instead of taking out two then, should be at liberty to take out four at the fall of the year; accordingly, between the 4th and the 20th days of October the plaintiff did take away four cows, thereby leaving Joseph Hall in the interim less than thirty. By the new agreement it was held the plaintiff had discharged the defendant, the surety. "I am of opinion," said Mr. Justice *Bayley*, "that this was an entire contract for the purchase of thirty cows; and if at the commencement of the term the plaintiff could not insist that this was a divisible contract, it must follow that it continued an entire contract during the term. I do not enter into the question whether there was a performance of the contract at the commencement of the term. It is sufficient to say that there was a *new agreement*, without the knowledge of James, that Joseph was to have the milking of twenty-eight cows during one part of the year, and thirty-two during the other part. That, as it seems to me, was not a continuance of the original bargain, which

(a) *Whitcher v. Hall*, 5 B. & C. 269; S. C. 8 Dowling & Ryl. 22.

was for the milking of thirty cows, but a new agreement. The new agreement was binding only on those persons who were parties to it. If it had been intended to bind James by it, he should have been consulted; he had a right to insist upon a literal performance of the original bargain. If a new bargain was made he had a right to exercise his judgment whether he would become a party to it. There may, perhaps, be very little difference between the two contracts, but the question does not turn on the amount of the difference; but the question is, whether the contract performed by the plaintiff is the original contract to which the defendant was a party. If it is, then James is bound by it, otherwise he is not. There is no hardship upon the plaintiff, for he knew that James stipulated to pay the rent upon his, the plaintiff's, fulfilling the terms of the original bargain, and that he, James, was not bound to consent to the substitution of a new contract."

153. The case of *Eyre v. Bartrop* (a) comes under the same rule as the last case, and is as follows:—In 1809, E. V. Eyre, the brother of the plaintiff, granted an annuity to R. B. Skurray and R. Skurray, and the plaintiff joined with him in the grant, as surety for the payment of it quarterly. In the annuity deed it was provided that E. V. Eyre or the plaintiff might redeem the annuity at a certain price, after giving seven days' notice. Some time after, the grantees, with the privity of E. V. Eyre, the grantor, assigned the annuity to the defendant, together with the benefit of the securities, and upon that occasion, by a new agreement, dated January 12, 1810, "it was declared and agreed by and between the defendant and E. V. Eyre, his heirs, &c., that the defendant, his heirs, &c., shall not nor will, at any time thereafter, *until the expiration of five years from the date of the deed*, or until the death of Edward Eyre, the father of E. V. Eyre, (whichever should first happen,) demand or sue for the annuity, or for or on account of any payment for or on

(a) 3 Madd. 221.

account thereof." The agreement also contained terms respecting the redemption of the annuity, different from those originally agreed upon, but more favourable to the grantor. Edward Eyre, the father, lived until after the expiration of the five years, and the annuities were not redeemed, nor the arrears paid to the defendant; and the defendant being unable to obtain payment, agreed, on the 25th of February, 1815, to accept the arrears by instalments. The plaintiff was not a party to the assignment, nor did he concur in its provisions; he also was not a party to the last-mentioned agreement, under which the arrears were to be accepted in instalments. The instalments not being paid, the defendant threatened to proceed against the plaintiff, the surety. The plaintiff's bill prayed that it might be decreed that he became released and discharged by the dealings and transactions between the defendant and E. V. Eyre respecting the annuity, and that the defendant might be restrained from proceeding upon any of the securities for the annuity. And the prayer was granted.

Per the Vice Chancellor:—"The defendant is proceeding to execution upon the judgment, and the plaintiff comes here for equitable relief. It could not be denied that if, by any arrangement between the creditor and the debtor, the situation of the surety is altered, that he is thereby discharged; but it is said, that the situation of the surety is here only partially altered during the five years; and that in respect of subsequent payments it remains the same. I am of opinion, however, that the deed of January, 1810, and the agreement of February, 1815, and the change in the terms of the redemption, have, either directly or by their consequences, wholly altered the situation of the surety, and that he is thereby wholly discharged."

154. In *Lopez v. De Tastet* (a) a verdict had been found for the plaintiff, and a new trial was granted on condition of the defendant's procuring a bond from Glyn

(a) 8 Taunt. R. 712.

& Co. to secure to the plaintiff such sum as eventually might be recovered, if a verdict should be given for him on the second trial. Glyn & Co. gave the bond, and afterwards a motion was made on behalf of the plaintiff to add to the rule for the new trial, a provision that the action should not abate in the event of the death of the defendant, the defendant being very aged; but the Court refused to alter the rule, on the ground that had this addition been required at first, Glyn & Co. might have refused to be bound; and, according to the principle of the two last cases, the addition, had the Court allowed it without the consent of Glyn & Co., would have discharged them.

155. The rule that any agreement between the principal parties, which is inconsistent with the terms of the original agreement to which the surety acceded, discharges the surety, prevails in favour of sureties in replevin. And therefore, the condition of a replevin bond being for the appearance of the tenant at the next county-court, and for his prosecuting his suit there with effect and without delay, the sureties are discharged, if the tenant and avowant agree to stay the proceedings in replevin, or to refer the suit to arbitration.

Thus, in *Bowmaker v. Moore* (a), the Court of Exchequer granted an injunction to restrain the avowant from proceeding at law against the plaintiff, a surety, on the ground that an agreement had been made between the tenant and avowant, one of the terms of which was, that pending a reference, which was to be brought to a conclusion on some future specified day, no proceedings should be taken in the action of replevin.

Per Curiam. "The bond was (of course) conditioned that the principal should prosecute his writ with effect against the landlord. The action of replevin is in fact entered; but afterwards an agreement is entered into between the landlord and the tenant, without the concur-

(a) 3 Price, 214.

rence of the surety, whereby the tenant is precluded from proceeding according to the condition. By that agreement, a mode is chalked out for ascertaining and arranging their mutual demands, and, in the mean time, all proceedings are to be stayed, so that the tenant is restrained, by the act of the landlord, from doing that which his surety has engaged he shall do. It turns out, indeed, that the same parties afterwards agree that the action shall proceed, so as to give the landlord his original remedy against the surety; but that is what we cannot suffer, after what has been done. When the agreement of reference was executed, the bond as against the surety was *functus officio*."

Previously to this application to the Court of Exchequer, the surety had applied to the Court of Common Pleas, where the action against him was pending, to set aside the proceedings (a), but that Court, adverting to a distinction between sureties in replevin and other sureties, thought the grounds of the application insufficient. In consequence of which, probably, the case was a second time argued (b) in the Court of Exchequer, when this Court again came to the same conclusion, and the Chief Baron, in the course of an elaborate judgment, delivered the following expositions of the reasons of the decision:—"The real and only question in this case is, whether the surety was, in point of fact, placed in a different situation by what had taken place on the arrangement between the principal (tenant) and obligee (avowant), and whether by such change of situation *he might have been prejudiced*, not whether he did in fact actually sustain any injury in consequence. A creditor taking a surety is bound to notice the nature of his engagement, and to protect him." "When Bowmaker (the surety) entered into the bond, it was probably on the faith of the implied contract that the proceedings should not be delayed, and he might have calculated on his principal continuing solvent for a given

(a) *Moore v. Bowmaker*, 6 Taunt. 379.

(b) 7 Price, 223.

time, during which there would be no risk. If so, a procrastination might have been extremely injurious to his interests, and that was a very probable consequence of Moore's agreement with Shirreff. Yet Moore stipulates for a delay, which might indeed benefit Shirreff, but not his surety, whose benefit Moore was also obliged to regard, and he (the surety) might say, *non hæc in fœdera veni*. I am not at liberty, in such a case, to inquire whether any inconvenience did actually arise to the plaintiff in consequence of the agreement between Moore and Shirreff; for if the plaintiff was discharged, he was discharged *at the time when the agreement was entered into between them.*"

156. In *Archer v. Hale* (a), the Court of Common Pleas recognized the authority of this decision, and upon the application of the surety, relieved him, on the ground, that the principal parties had agreed to refer the suit in replevin to arbitration. This decision, however, I conceive, leaves in full force the rule (b), that an obligation created by an instrument under seal, cannot be extinguished at law by an agreement of an inferior nature; and therefore, unless the agreement upon which the surety rests his claim to be discharged is of record, which, seemingly, it would be if made a rule of Court, or is under seal, the surety cannot avail himself of it as a defence at law (c), by pleading, but must apply specially to the Court, as was done in this case, for relief, and the court of law, in virtue of the special jurisdiction given to it by statute (d), in the case of actions upon replevin bonds, will give such relief

(a) 1 Moore & Payne, 285; S. C. 4 Bingham, 464, overruling *Moore v. Bowmaker*, ante, p. 123. The principle of *Moore v. Bowmaker* was recognized by the Court of K. B. in *Hallett v. Mountstephen*, 2 Dowling & Ryland, 343. But it may be observed, that this case came before the Court upon

an issue, and one to which the agreement between the principal parties was wholly irrelevant.

(b) See post, *Butteel v. Jarrold*, and *Davey v. Prendergrass*.

(c) See the judgment of *Abbott*, C. J. in *Davey v. Prendergrass*, 5 B. & Ald. 190.

(d) 11 Geo. 2, c. 19, s. 23.

“as may be agreeable to justice and reason”, that is, relief in effect the same as that of a Court of equity.

157. In *Ward v. Henley* (a) the plaintiffs were sureties in replevin, and assuming to have the right of exonerating themselves by restoring to the avowant the goods replevied, in case the tenant failed in his action, they contended they were entitled to relief, because the landlord had sold the goods under a subsequent arrangement with the tenant, and so deprived them of this mode of exoneration; but relief was granted, not upon this ground, the validity of which the Court declined to consider (b), but because the rent for which they were liable had been fully paid before the trial of the action of replevin.

158. In *Skip v. Huey*, the plaintiff filed his bill for relief under the following circumstances:—Edwards, one of the defendants, a surety, was jointly and severally bound with the two other defendants, who were the principal debtors, in a bond conditioned for the payment of 2000*l.* on the 5th of March ensuing. Huey came to the plaintiff and prevailed on him to give up the bond, and take in lieu of it four notes of different persons, and he signed an agreement in his own name and the names of Wilcox and Edwards, the surety, but without Edwards's authority, that if the notes should not produce the whole 2000*l.*, and interest, they would see him paid the deficiency. Huey also gave the plaintiff a draft on his banker, and, with the plaintiff's leave, dated it Monday instead of Saturday, the day on which it was given, and on the Saturday drew his money from the hands of the banker. Huey and Wilcox became bankrupts, Edwards continued solvent, and for the plaintiff it was contended that he was entitled to be relieved against the latter, because the transaction was fraudulent on the part of Huey. But, *per* the Lord Chancellor,—“I have had some doubt during the course of this cause, but I am now fully satisfied that the plain-

(a) 1 Y. & J. 285.

(b) Upon this point see the judg-

ment of *Gibbs*, C. J. in *Moore v. Bowmaker*, 6 Taunt. 379.

tiff is not entitled to relief. Mr. Edwards has not been guilty of any fraud. There are many cases where equity will set up debts extinguished at law against a surety as well as against a principal; as, where a bond is burnt or cancelled by accident or mistake, and much stronger, if a principal procure the bond to be delivered up by fraud, in such a case the Court would certainly set it up, because he shall not avail himself of the fraud of any of the debtors. But this is not one of those cases, for the whole transaction was in order to discharge Edwards; Mr. Skip was told so, and Huey informed him that Edwards and he had quarrelled about it, and Skip himself asked Edwards how he came to be so pressing to have the bond delivered up, so that he was fully apprised it was solicited at the importunity of Edwards. Skip was a competent judge of what he should do, and might have declined it; but, instead of that, he accepts the notes from Huey, and a draft on Martin the banker for the Monday following, which shews the confidence and reliance Skip had in Huey, for it is very unusual to take such a draft. It is plain from hence that Skip discharged Edwards, for he knew Edwards would not trust Huey any longer. What is the rule? he who trusts most shall lose most; if Skip had refused, Edwards might have arrested Huey upon the note which he had given Edwards by way of indemnity against the bond. It is said there is fraud in part of the case relating to the draft on Martin; perhaps it may be so, but this is not clear; and what has been done by Skip preponderates and rebuts the fraud; for it was not right in him, after he had delivered up the bond, to make Huey sign such an agreement in the names of Wilcox and Edwards. What was the original scope and intention of the application, but that the bond might be delivered up and Edwards absolutely discharged? Instead of this what does Skip do? Why he takes a note, and makes Edwards liable by another instrument, and this was a plain deceit upon Edwards; whereas the intention was

clearly to discharge him, and therefore the bill must be dismissed, but without costs."

159. The surety is discharged if the creditor, without his consent, agrees to give time to the principal debtor.

In *Nisbet v. Smith*(*u*), the creditor, after having arrested the principal, waived his proceedings in the action, and accepted a warrant of attorney to confess judgment, with a stay of execution for three years in case interest should be paid regularly, and the Lord Chancellor, therefore, relieved the surety. The case was as follows :—

William Maynard had mortgaged his estate for 5000*l.* to W. Blomberg, Esq., and after Mr. Blomberg's death charged it with 6000*l.* more to Ann, his widow, who shortly afterwards married the plaintiff. At the time of the plaintiff's marriage, his own estate was mortgaged for 6500*l.* to the defendant, and for the purpose of disencumbering it, the plaintiff and Josiah Maynard, brother of William Maynard, and the defendant, entered into an agreement which was performed in the following manner: William Maynard's mortgage being 11,000*l.*, Josiah paid the plaintiff 4500*l.* on account of it, which left a balance of 6500*l.*, the amount of the plaintiff's mortgage to the defendant, and the defendant accepted from the plaintiff a transfer of William Maynard's estate in exchange for the plaintiff's. In the deed of transfer, just mentioned, there was a proviso for the redemption of the estate by Josiah Maynard on or before the 14th of April, 1783, and a covenant by him to pay the money according to the proviso. At the same time he and the plaintiff entered into a joint covenant and bond to pay the money according to the proviso, and the plaintiff took from him a counterbond falling due the same day as the other securities, and the plaintiff and defendant took from him a covenant to them jointly for the payment of the mortgage money.

The money was not paid at the stipulated time, the 14th April, either by William Maynard or Josiah Maynard;

and the plaintiff called on the defendant to compel payment by the latter, in consequence of which, the defendant held him (Josiah) to bail for 6500*l.* but was afterwards prevailed on to waive further proceedings, and to accept a warrant of attorney to confess judgment, with a stay of execution for three years in case interest should be paid regularly. This warrant of attorney was taken without notice to the plaintiff; and the plaintiff, therefore, prayed to be relieved from the debt and from every security and engagement relative to it.

The defendant Smith insisted that the plaintiff was a principal and not a surety. But the Lord Chancellor thought otherwise, and adjudging that Josiah Maynard had become the principal debtor, and the plaintiff a mere surety, he decreed a perpetual injunction to restrain the defendant from suing the plaintiff on the bond. *Per* the Lord Chancellor. "The plaintiff Nisbet complains of this transaction as unjust, as it gave a credit for three years longer than the bond imported, contrary to his inclination, who was the surety named in it; in addition to which circumstance the plaintiff had not only never consented to such credit being given, but had pressed the obligee to bring his action upon the bond, which was so brought and compromised without the privity of the plaintiff so bound in that bond. This case differs from the common case (in which the surety comes into this Court to be relieved), as the obligee had done the very thing which the Court would have compelled him to have done, namely, to bring his action; but contrary to that case and the faith of that action, (he) has given credit to the principal debtor beyond the term originally stipulated in the bond, at the expense of the surety: he thinks fit to compromise the action, under an idea that the surety would comply; therefore, the mere question is, whether he should oblige the surety, contrary to his express consent, to remain as such for a longer time than he bargained for at first, and I am of opinion that he cannot do that."

160. So where there was a joint bond (a) for 10,000*l.* by the debtor and the plaintiff as his surety, upon which the surety was to be liable to the extent of 6000*l.*, and for 4500*l.* part of the balance ultimately found due, the creditor took a mortgage from the debtor, and as to the residue accepted from him a warrant of attorney for payment by instalments, but expressly without prejudice to any securities held by the creditor, the Lord Chancellor held that the remedy against the surety was gone notwithstanding the reservation of securities, and relieved the surety.

161. In *The Bank of Ireland v. Beresford* (b), a case appealed from the Court of Exchequer in Ireland, it appeared that the respondents had executed a bond and warrant of attorney to secure the sum of 10,000*l.* advanced to Blair by the appellants under the authority of an act of parliament; and that after the loan should have been paid, Blair obtained several extensions of credit, until at length he became bankrupt: the appellants then entered up judgment on the bond and warrant of attorney, and being about to levy execution, the respondents filed a bill for a perpetual injunction to restrain them, on the ground that they had extended the credit beyond the period originally agreed upon; and the Court decreed an injunction, and the House of Lords affirmed it.

162. So in *Rees v. Berrington* (c), where the bond in which the plaintiff, a surety, was engaged, was for the payment of a debt by two instalments, and after one instalment became due, the defendants, the obligees, took promissory notes for the payment of both instalments, the Lord Chancellor granted an injunction to restrain an action against the surety.

Per the Lord Chancellor.—“The form of the security

(a) *Boulton v. Stubbs*, 18 Ves.
20. Also see *post*.

(b) 6 Dow, 233. The remarks of the Lord Chancellor here reported were extra-judicial, the case

not being, at the time they were made, in a state sufficiently complete for adjudication.

(c) 2 Ves. 540.

forces these cases into equity, but take it out of that form, and suppose in this instance that the plaintiff was a surety by a proper bond at law as surety, what is the consequence? Where a man is surety at law for the debt of another, payable at a given day, if the obligee defeats the condition of the bond, he discharges the security. When they are bound jointly and severally, the surety cannot aver by pleading that he is bound as a surety; but if he could establish that at law, the principle at law is, that he has an interest in the condition, and if the period is extended, that totally defeats the condition, and the consequence is, the surety is released from his engagement. Suppose a bond payable in six months with a surety, he does not become bound to answer the payment at twelve months, where it was to be at six. The principle is a legal principle. In this Court they all appear as principals, but establish the fact that he is surety, he is surety to a definite, not an indefinite engagement. Here, upon the second instalment, the defendants have extended the time before that instalment became due; if the time is extended after it becomes due, that makes a difference at law, for then the bond has been once forfeited. It is perfectly plain, from the nature of the engagement, that the plaintiff became security that the debt should be paid at two periods; one has elapsed; the obligee thinks fit totally to change the nature of the security and the credit; he takes notes, gives a further time of payment, and repeats the same thing as to the second instalment, which was not then due; and doing this, he does this material injury to the surety, he (the surety) has a right, the day after the bond is due, to come here and insist upon its being put in suit; the obligee has suspended that till the time contained in the notes run out; therefore he has disabled himself to do that equity to the surety which he has a right to demand. If the application was proved, it is a duty to comply with it. The defendants have put it out of their power to perform that which the nature of the relation between the surety and the person with whom he is bound requires.

It is a breach of the obligation in conscience and honesty, and, it is not too much to say, of that obligation in point of law. I cannot try the cause by inquiring what mischief it might have done, for that would go into a vast variety of speculation, upon which no sound principle could be built; but it is plain here, if the plaintiff had been informed of these transactions, and the situation of the debtors, their difficulties and delay in performing the prior engagement, he never would have been so foolish as to have parted with the money in November, 1792; and the money in his hands was a full security. I do not ground much upon it, for the case would be the same if those circumstances had not come out clearly in evidence. This produces no inconvenience to any one, for it only amounts to this, that there shall be no transaction with the principal debtor, without acquainting the person who has a great interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity, not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You cannot keep him bound, and transact his affairs, (for they are as much his as your own,) without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement. The authorities fully warrant me in this; though I should have granted the injunction even without that strong authority (a) before Lord *Thurlow*, which is rather less favourable for the surety. There the creditor being called upon, did put the bond in suit. If he had proceeded, the consequence would have been only that he would have had the person in custody; it would have been no payment; thinking that, by leaving the debtor at large, and taking a judgment against him which affected all his property, he pursued a better mode, using his discretion, and acting upon his own account, he thought it better to give stay of execution than to have confounded

(a) *Nisbet v. Smith*, ante, p. 127.

the affairs of the man by destroying his credit and holding him in prison; but he did it without consulting the surety; and therefore Lord *Thurlow* held, and very rightly, that the surety was discharged. The transaction in this case was much more mischievous; after the communication of circumstances that shewed great embarrassment, great difficulty, and great distress, indulgence was from time to time given under circumstances apparently very hazardous, without any communication with this man, who had so great an interest, and who in the interval had given up the fund which probably was the inducement to him to be the security."

163. In *Samuel v. Howarth* (a) the plaintiffs were engaged upon the following guarantie:—"We engage to guarantee you the payment of any goods you may supply to Mr. Isaac Henry between the 2d of April, 1814, and the 2d of April, 1815." It is to be observed that no particular credit is stipulated for; credit, therefore, according to the usual course of trade, was held to be implied, which in the present case was six months as to part of the goods supplied, and nine months as to the rest, with a bill at three months. But the bills given not having been paid, the defendant took fresh bills at a new date, and it was held he had thereby discharged the surety.

"In the present case," said the Lord Chancellor, "the creditor has been supplying goods to the principal debtor, from time to time, upon a certain credit, the extent of which not being expressly stipulated between the parties, I must take to be credit given according to the usual course of trade. The surety says, I will be answerable for the amount of such goods as you shall furnish during the period from the 2d of April, 1814, to the 2d of April, 1815. It is impossible for me to hold that this is an engagement by which he has rendered himself liable for an indefinite time beyond the expiration of the period limited for the delivery of the goods. It cannot be supposed that he meant to continue liable after the 2d of April, 1815, so

(a) 3 Mer. 272.

long as the defendant might choose to renew the bills of the principal debtor. You cannot contend in support of such an extravagant proposition. It has been truly stated that the renewal of these bills might have been for the benefit of the surety; but the law has said that the surety shall be the judge of that, and that he alone has the right to determine whether it is or is not for his benefit. The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety.”

164. But, merely taking a new security from the debtor, without agreeing to give him time, will not discharge the surety.

In *Twopenny and Boys v. Young (a)*, the defendant joined one Rummins in a joint and several promissory note payable on demand for a debt of the latter. The plaintiffs, who had been in partnership, were the payees of the note, and one of them, Boys, with whom Rummins continued to deal after the dissolution of the partnership, took from Rummins a bill of sale as a security for his debt, including the sum due on the promissory note, the existence of which was recited in the bill of sale, and the bill of sale purported to be given as a *further* security: the bill of sale also contained a proviso that it should not be enforced until after three days notice to Rummins. For the defendant it was contended, that the acceptance of the bill of sale was a giving of time to Rummins, and discharged the defendant; but *Bayley, J.* said, “Whether the mere act of giving time to the principal does or does not discharge the surety, it is not necessary in this case to decide, because, as it seems to me, the bill of sale does not give time to the principal. It recites an *existing* security, and purports to be given as a *further* security; it could not therefore be intended to limit or restrain the rights or remedies which the plaintiff had previously possessed. Generally, a simple contract security is extinguished by a

(c) 5 Dowling & Ryland, 259; S.C. 3 B. & C. 208.

specialty security, if the latter gives a remedy co-extensive with that given by the former. Whether it is the same when the remedies are not co-extensive, we are not called upon to decide; because where the instrument by its language shews that parties intended the old security to remain in force, the mere acceptance of a new security will not extinguish it, as was recently decided in the case of *Solly v. Forbes* (a). Here the language of the instrument does shew that it was intended only as a further security, and therefore it is the same as if it had contained an express proviso to that effect; consequently it does not operate as an extinguishment of the remedy on the note, either as against the principal or the surety."

Holroyd, J. remarked in the course of his judgment, "The deed gives the plaintiffs (b) no higher right of action against Young:" and therefore it did not effect a merger.

In like manner, in *Emes v. Widdowson* (c), an action upon two bills of exchange, by the drawer against the acceptor, where the defence was, that the plaintiff and defendant had come to an arrangement, in consequence of which the defendant assigned (by deed) certain property as a security for certain sums then due and also for all future demands, with a power of sale, which however was not to be executed until after six months notice, *Tindal*, C. J. said, that such an assignment could only be considered as a collateral security; that the personal remedy was not suspended, because there was no clause to that effect, and therefore that the plaintiffs were entitled to a verdict.

165. The surety also is not discharged by the creditor's agreeing to give time, if the agreement was authorized or ratified by the surety.

In *Tyson v. Cox* (d), it appeared that the surety, having been applied to by the solicitors of the creditor

(a) 2 Brod. & Bing. 38.

(d) 1 Turner, C. C. 395. See

(b) This deed was executed to only one of them.

also *Maltby v. Carstairs*, 1 Manning & Ryland, 54; S.C. 7 B. & C.

(c) 4 Car. & Payne, N.P.C. 151.

735.

for payment, obtained an interview with the principal debtor, at which he told the latter to see the solicitors and do the best he could with them; in consequence of which the principal went to the solicitors and made an arrangement with them for further credit. This arrangement, the plaintiff contended, discharged him, as surety; but the Lord Chancellor considered it as made under his authority, and therefore refused to relieve him.

166. Forbearance, or mere passiveness, for any length of time, on the part of the creditor towards the debtor, will not discharge the surety; because, until called upon by the surety, the creditor is under no obligation to sue the debtor.

In *Eyre v. Everett (a)*, the plaintiff, a surety, filed a bill for relief, on the ground that disputes had arisen five years before between him and the defendants, the creditors, as to his liability, in which he denied his liability; and that, nevertheless, the defendants had suffered that period to elapse without taking means to obtain payment from the principal debtor, who had in the mean time become insolvent and fled the country. But the Lord Chancellor thought these facts proved only passiveness on the part of the creditor, and he refused to relieve the plaintiff, as surety.

167. In *Orme v. Young (b)* the action was upon a bond conditioned for the payment of 22,000*l.* part of it, by instalments of 1000*l.* half-yearly from the 29th of September, 1807, to the 29th of September, 1812, and then the residue.

The defendant pleaded, that he entered into the bond as surety for William Orme, and that after the 29th of September, 1812, when the sum of 13,000*l.*, residue of the principal money, became due, the plaintiff forbore and gave day of payment to William Orme, without the privity and consent of the defendant.

The evidence in support of the plea was as follows; that the defendant was one of ten sureties; that William

(a) 2 Russ. 381.

(b) Holt, N. P. C. 84.

Orme paid the instalments regularly, but instead of paying the whole of the residue on the 29th of September, 1812, as was stipulated, he continued to pay sums of 1000*l.* at different periods, and made in this manner five payments, down to January, 1815, and in March, 1815, he became bankrupt. Notice was not given to the sureties of his default in the payment of 8000*l.* and it did not appear that they were privy to the mode in which he had made the subsequent payments. The plaintiff indorsed all the payments upon the back of the bond, giving credit for them as half-yearly ones, and not making any distinction between those before the 13,000*l.* became due and those made afterwards. There was no evidence of any positive agreement for forbearance; but it was contended, that an agreement might be inferred from this mode of payment.

Gibbs, C. J. said, " The defence upon the record is, that the plaintiff, upon the 29th of September, 1812, forbore and gave day of payment to William Orme junior, in other words, that the obligee has extended the terms of the obligation without the privity of the sureties. This defence is borrowed from a court of equity: there if day of payment be given to the debtor, the sureties are discharged. It is the equitable right of sureties to come into a court of equity and demand to sue in the name of the creditor. Now, if the creditor have given time to his debtor, the surety cannot sue him; but the fact to be tried is, was time of payment given without the privity of the sureties? What is forbearance and giving time? It is an engagement which ties the hands of the creditor. It is not negatively refraining; (not merely) not exacting money at the time; but it is the act of the creditor depriving himself of the power of suing, by something obligatory, which prevents the surety from coming into a court of equity for relief; because the principal having tied his own hands, the surety cannot release them. Here there is no contract to forbear; no impediment to the

suit. A neglect to give notice to the surety that the debtor has made default does not discharge him. The present issue is, was there an agreement to forbear? I am of opinion there was none."

168. In like manner, in *Heath v. Kay (a)*, where the question was, whether it sufficiently appeared that the creditor had given time to the principal, *Alexander, C. B.* said, "In order to discharge a surety, which I must take this person to be, there must be a contract between the creditor and principal debtor, so as to prevent the surety from having the same remedy against the principal as he might have had upon the original contract. This reduces this (case) to a question of fact, and to raise an equity to induce this Court to interfere, that circumstance must be shewn from the answer." The answer was thought to afford insufficient evidence, and relief was not granted.

169. In the *Trent Navigation Company v. Harley (b)*, an action upon a bond conditioned for the principal obligor to account for and pay over from time to time all such tolls as he should collect for the obligees, the laches of the obligees, in not properly examining the accounts of the collector, for a succession of eight or nine years, and in not calling upon him for payment of the arrears so soon as they might, had they examined his accounts, was held not to be an estoppel at law in favour of the defendant as surety. *Per Lord Ellenborough, C. J.* "The only question is, whether the laches of the obligees in not calling upon the principal so soon as they might have done, if the accounts had been properly examined from time to time, be an estoppel at law against (*query*, in favour of?) the sureties. I know of no such estoppel at law, whatever remedy there may be in equity."

In the same case, Mr. Baron *Wood*, at *Nisi Prius*, ruled

(a) 1 Y. & J. 434.

(b) 10 East's R. 34.

it not to be a defence for the sureties that they had had no notice of the default of their principal (a).

170. In *The London Assurance Company v. Buckle* (b), the defendant was sued upon a bond which he had executed jointly with one Hamilton, conditioned for the payment of such premiums as Hamilton might owe the plaintiffs, the plaintiffs giving him six months credit; it appeared, that Hamilton became indebted to a large amount for premiums on policies effected between the 21st of January, 1811, and the 6th of April, 1813, part of which he paid at different times; but in June, 1816, he became bankrupt, and then, for the first time, an intimation was given to the defendant of the claim existing against him; it was held, that the defendant was not discharged by the plaintiffs having suffered the credit of Hamilton to run on so long beyond six months, the stipulated period.

171. The surety, in limiting his own liability to a certain amount, is not understood to impose on the creditor the obligation of keeping his dealings with the principal within the same limit; and, therefore, the surety is not discharged by advances being made to the debtor beyond that limit, or by a new credit being given to him upon an account different from that to which the surety is a party.

In *Eyre v. Everett* (c), the plaintiff, a surety by bond, filed his bill for relief, on the ground that the defendants, the creditors, subsequently took from the princi-

(a) See also *Nares v. Rowles*, 14 East's R. 514.

(b) 4 J. B. Moore, 153. The case of *Goring v. Edmonds*, 3 M. & P. 259, is to the same effect, though, in degree, feebler, because the decision was influenced by an admission of liability, made by the defendant. In *Peel v. Tatlock*, *post*, p. 148, three years elapsed after the cause of action accrued, before

a demand was made upon the surety, and a verdict was given against the surety: but the question does not appear to have been put very distinctly to the jury, whether the lapse of time discharged the surety.

(c) 2 Russ. 381; S. C. at law *Everett v. Eyre*, 9 J. B. Moore, 336.

pal debtor another bond for a still larger amount than the first; from which the plaintiff argued, that either the previous demand was included in the latter bond, or if it was not, then the advancing to so large an amount upon the other security made such an alteration to his prejudice as discharged him. But the Lord Chancellor said, "In my opinion, they (the first advances) do not discharge him. I have never known a case in which, where a principal and surety were indebted upon the same bond, a dealing with the principal, by considering him as a debtor in another sum of money, or upon another security, was held to discharge the surety in the first obligation. And I apprehend that the circumstance of the not calling upon Eyre to join in the bond is a circumstance from which no inference in his favour can be drawn." However, without questioning the justness of this decision, it may be observed, that in *Ex parte Rushforth* (a), where the condition of the bond was for payment within two calendar months after notice of all sums due, the Lord Chancellor said, "It might be a question, whether according to the true nature of such an engagement between all the parties, it was competent to the obligees to go on increasing their advances beyond the amount of the bond without giving notice to the surety."

172. If the liability of the surety is made to depend upon any act of the creditor, as, upon his making a demand upon the surety, and no time is mentioned, such act must take place or demand be made in a reasonable time, otherwise the liability never attaches.

In *Payne v. Ives* (b), the guarantie was as follows:—
 "We undertake to indorse any bill or bills Mr. John Stubbs may give to Messrs. Payne and Co. in part payment of an order for lace which is now being executed for him; Messrs. Payne and Co. to allow 5*l.* per cent. on the amount of the said bills for the said guarantie." Signed by one of the defendants on behalf of himself and the

(a) 3 D. & R. 664.

(b) 10 Ves. 409. See *post*.

others his partners, and dated, April 19, 1821. The order referred to was intended for India, and immediately after it was executed Stubbs paid the plaintiffs 500*l.* in money and wine; and in June they drew on him for 337*l.*, at eighteen months' date, the usual credit in the India trade. For seventeen months and ten days the plaintiffs retained this bill without making any application to the defendants to indorse it, and at the expiration of that time Stubbs became insolvent. The plaintiffs then tendered the defendants 17*l.* for the per-centage, or commission mentioned in the guarantie, and required their indorsement to the bill; but the defendants would neither accept the commission nor indorse the bill, and in their defence they insisted that the length of time the plaintiffs had kept the bill without tendering the commission, or demanding the indorsement, was a waiver of the contract of guarantie. The learned judge (*Abbott, C. J.*) overruled this, as well as another objection, and the plaintiffs obtained a verdict. But in banc, the learned Chief Justice, in concurrence with the rest of the Court, thought the defence valid and granted a new trial.

Per Abbott, C. J.—I think there ought to be a new trial in this case, but it must be upon payment of costs by the defendants. The 5*l.* per cent. is to be allowed "for the said guarantie:" and therefore the plain meaning of the contract is, that the indorsement of the bill should be the consideration for the commission, and that until the bill was indorsed no commission should be due. This I take to be the legal construction of the instrument, and then the question arises, whether application for the indorsement was made in due time. Now the general rule of law upon such subjects is clear, namely, that the demand must be made within a reasonable and convenient time. But for the plaintiffs to forbear their demand for seventeen months out of eighteen, was neither reasonable or convenient, for it was inflicting an injury upon the defendants by keeping them during all that time out of their

commission. Besides, here the plaintiffs lie by until they learn that Stubbs has become insolvent, and until they discover that the indorsement is the only means by which they can secure their debt; and but for that discovery they probably never would have applied at all. That, I think, they were not entitled to do under the agreement, and consequently that they ought not to have recovered in this action."

Bayley, J. said, "I entertain no doubt upon the legal construction of this guarantie. It gives the plaintiff an option to have the indorsement or not, but it provides that they are not to pay the commission unless they do have the indorsement. It is signed by the defendants only, for if it had been intended to have been binding on both parties, both would have signed it. Then the option given to the plaintiffs ought to have been made in reasonable time, and at any rate before that event occurred, of which, if the defendants had known, they would never have signed the guarantie. I am therefore of opinion, that the conduct of the plaintiffs has been contrary to the spirit of the agreement, and that the case ought to be submitted to the consideration of another jury."

173. In *Oxley v. Young (a)*, the declaration stated that one Bystrom, of Gottenburg, had ordered of the plaintiff goods of the value of 260*l.*, and that in consideration that the plaintiff would execute the order, the defendants undertook to pay him 130*l.*, by a bill at three months, to be drawn on them at the expiration of nine from the date of the invoice.

It appeared that Bystrom had ordered about two hundred pounds worth of goods, with directions to the plaintiff to draw for half the amount on the defendants, that the plaintiff inquired of the defendants, whether he might rely on their accepting, and they declined then to accept, because they had not yet received a counter security, which Bystrom had promised them; but receiving it shortly after-

wards they wrote to the plaintiff to say they were ready to give him their acceptance; and the plaintiff replied, that he should put the order in hand for execution. In the period between the 25th of March and the month of June the defendants stopped payment; and in the same period the plaintiff shipped the goods according to Bystrom's directions. In September following, the defendants wrote to the plaintiff to revoke the guarantie, and to know whether the order was executed, saying they presumed it was not, as they had not been advised of it. No answer was given to this communication for some days, in consequence of the plaintiff's absence from home when it arrived, and in the mean time the defendants returned to Bystrom the counter-security. The defence raised upon these facts was, that the defendants ought to have had notice of the shipment of the goods, and that the plaintiff had been guilty of gross negligence, in not answering immediately the defendant's letter of September, whereby the defendant had lost his counter-security. But *Eyre*, C. J. said, "The right to sue on the guarantie attached when the order was put in a train for execution, subject to its being actually executed. Then the question is, whether any thing happened to divest that right. Now the right could not be divested even by a wilful neglect of Oxley, though perhaps he might be liable to an action on the case at the suit of Young and Co., if any such neglect could be shewn, contrary to all good faith, and by which a loss had been incurred. But still this could not discharge Young and Co. from their engagement. They have been unfortunate in concluding too hastily, from not receiving an answer from Oxley, that the order was not executed."

According to the principle of the decision in *Payne v. Ives*, there would perhaps have been a valid defence in this case, had the plaintiff neglected to call on the defendants for their acceptance in a reasonable time after the expiration of nine months from the date of the invoice.

174. If the creditor parts with securities, or any fund,

which he would be entitled to apply in discharge of his debt, the surety becomes exonerated, at least, to the extent of the value of such securities; because securities, which the creditor is entitled to apply in discharge of his debt, he is bound either so to apply, or to hold them as a trustee, ready to be applied, should the surety desire it. Of this principle the case of *Mayhew v. Cricket* (a) affords an exemplification. There a debt was secured by two promissory notes, each for half the amount, of two sureties, and also by a warrant of attorney of the principal debtor, upon which the creditor had entered up judgment, and taken the goods of the debtor in execution, but he afterwards withdrew the execution.

Per the Lord Chancellor, *interloc.*—"The second ground (in support of the bill by the sureties) was, that the defendants, by releasing the execution, had relinquished their remedy, at least *pro tanto*. I always understood, that if a creditor takes out execution against the principal debtor, and waives it, he discharges the surety, on an obvious principle, which prevails both in Courts of law and in Courts of equity. The principle is, that he is a trustee of the execution for all parties interested."

In consequence of this interlocutory declaration of opinion, the defendants released one of the plaintiffs without any adjudication upon the point; but Mayhew, the other surety, by a new promise, had rendered himself again liable. "They swear, that in the presence of two witnesses, Mayhew, knowing that the execution had been withdrawn, promised to pay the debt; and it cannot be objected that there is a want of consideration for such a promise. If a creditor, having given time to the debtor primarily liable, makes a demand on one who is secondarily liable, and receives a promise from him, that is suf-

(a) 2 Swanst. 185.

ficient (a) to sustain the demand, not as the creation of a new, but as the revival of an old debt."

175. Another exemplification of the principle just stated is afforded by the case (b) which follows:—

Upon the appointment of William Tierney to the office of military paymaster to the East India Company, the plaintiff joined him in a bond for sicca rupees 100,000, conditioned for his duly accounting to the company. William Tierney died, and the company claimed from his administrator a balance of sicca rupees 689,729: in a subsequent statement the balance claimed was reduced to something less than the penalty of the bond; and after some further investigation the paymaster-general of the company declared the claim to be altogether unfounded, and stated the balance to be sicca rupees 50,548 in William Tierney's favour; and, upon the paymaster's report, this sum was paid to W. Tierney's administrator in India, who immediately remitted the effects, through the company's treasury, to the other administrator in England. After this had taken place, the plaintiff, who was also in the company's service, obtained leave to come to England; but, just before he was about to sail, he received a notice that a claim to the amount of his bond was still subsisting against the estate of W. Tierney, and that he would not be allowed to proceed to Europe until he gave security for it; in consequence of which he procured two sureties, with whom he deposited an indemnity, and they, under a threat of proceedings, paid the demand to the company. The case came before the Master of the Rolls (Sir *William Grant*) on a bill for relief: several points were raised; but that which alone it is material to state here is, that it was decided that the repayment of the sicca rupees 50,548, part of the assets of W. Tierney, to the administrator, was, to that extent, a complete discharge of his

(a) On the revival of debts by a new promise, see *Trueman v. Fen-ton*, Cowp. 544. (b) *Law v. E. I. Company*, 4 Ves. 824.

surety; and was so, whether the repayment took place with or without the consent of the company, or in ignorance on the part of their officers or not. And with reference to this part of the case the M. R. said, "In the same year a very important transaction took place, at least with regard to the sureties. The officers of the company, as they say, without their concurrence, and against their consent undoubtedly, if any thing remained due from him, allowed the balance stated to be due to him, and paid the administrator 50,548 rupees. There is some difference as to the sum in the bill and answer. Nothing is more clear than, whether that was done with the consent and by the orders of the company, or not, but ignorantly by their officers, it was as to the two sureties a complete discharge. It cannot be contended, upon any principle that prevails with regard to principal and surety, that, where the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can ever be called upon. This payment, therefore, or permitting that part of the assets to be paid back to the administrator of the principal by the officers of the company, whether with their consent or ignorantly, is a complete discharge of the two sureties."

It was a question whether the surety was totally discharged, or only discharged to the extent of sicca rupees 50,548, the sum paid to the administrator of the principal. "As to the other sum," the balance paid on account of the plaintiff to the company, the M. R. said, "there is much doubt whether that ought to be refunded. But upon full consideration of all the circumstances, I think I should not do justice without decreeing the repayment of that sum; for the company ought not to have demanded the payment, if they demanded any security. There is no doubt that, upon a joint and several bond, each obligor is a principal at law: but this Court makes a wide difference, as justice requires, between principals and sureties. What is the obligation of the surety? Merely that

Mr. Tierney shall duly account, and that he shall pay any balance that may be due from him. The account ought to be settled before the surety is called upon, unless there is a fear of insolvency. That is the obligation the sureties supposed themselves to enter into. Instead of that, for six or seven years this matter goes on; no demand is made; one of the sureties withdraws his assets, and the principal himself is permitted to do so Then, after all these circumstances, that sum paid to the representatives of the principal, permitting the assets both of him and one of the sureties to be withdrawn, the account going on unliquidated for six or seven years, this demand is made by the company against a surety, not only to give security to pay the balance that shall appear due upon the account, but to pay without proceeding to take the account; and they enforce it by the power they had over him as one of their servants. Had they not had that power, they could not have compelled him to pay without taking the account. What is the fair justice? That they shall not be the better for exercising that act of power. Then upon what terms is this plaintiff entitled to be repaid? It must be upon giving security for repayment of the sum of 46,309 rupees, in case, after the determination of any proceedings that may be had against Mr. Tierney, the surety may be held liable. Till that question (of the real state of the account) is determined, I certainly shall not permit any such suit against the surety."

176. Any neglect also of the creditor, occasioning the loss of securities, to the benefit of which the surety is entitled, will, pro tanto, discharge the surety. In *Capel v. Butler* (a), the plaintiff was engaged in a bond to the defendants, as surety for an annuity; and an action having been commenced against him, he filed a bill for relief, on the ground that the defendants, the grantees of the annuity, had not procured a complete and effective assignment of certain vessels which, with the privity of the

(a) 2 Simon & Stuart, 457.

plaintiff, were agreed to be assigned as an additional security for the annuity. The omission which rendered the assignment ineffective was, a non-compliance with the formalities required by the ship registry acts; in consequence of which the grantor afterwards disposed of the vessels to other parties. There was a proviso in the deed for the redemption of the annuity by White, the grantor. The Vice-Chancellor was of opinion that the plaintiff, as surety, was entitled to take advantage of the proviso for redemption, and that as the value of the vessels had been lost to him by the neglect of the defendant Butler, he was entitled to deduct it from the stipulated price of redemption.

177. The concealment from the surety of any of the terms of the principal contract, prevents any obligation arising from the engagement of the surety; it renders the engagement a nullity.

In a mercantile contract, if the surety is not informed of the price of the goods, the market price is understood, and any private bargain between the creditor and principal for a different price, annuls the liability of the surety. In *Pidcock v. Bishop (a)*, the defendant had guaranteed the plaintiffs to the amount of 200*l.*, for pig-iron to be supplied to Thomas Tickell. Tickell owed one of the plaintiffs an old debt, and agreed to pay 10*s.* per ton more than the market price in liquidation of it. This agreement was concealed from the defendant, the surety; and therefore he was held not liable.

Abbott, C. J. said, "I think that in every transaction like the present, a condition is virtually incorporated, that the party who is required to give a guarantee shall be truly informed of the bargain really made by the vendor of the goods with the buyer. Now, if it be part of the bargain that any thing extra shall be invoiced with or tacked to the market price of the goods, which is not communicated to the guarantee [guarantor], I think the

(a) 5 Dowl. & Ryland, 505; S. C. 3 B. & C. 605.

withholding of that circumstance discharges the guarantee. In this case the bargain was, that the purchaser should pay beyond the market price of the goods supplied to him 10*s.* per ton, which was to be applied in payment of an old debt due to one of the plaintiffs. This was an agreement which it was of the utmost importance should be communicated to the defendant, as respected the degree of his responsibility; for the effect of it was to enable the vendor to appropriate to the payment of the old debt, part of those funds which the defendant might reasonably suppose would go towards the payment of those goods for which he became guarantee, and consequently his risk became increased. It is more than probable, that if the defendant had been informed by Tickell that the plaintiffs would not trust him unless he agreed to pay part of his old debt by way of advance upon the market price of the goods, he would have said, 'No, I will have nothing to do with you. If you are dealing as a free man, you may probably be able to pay the debt which you are now incurring; but if you are not dealing as a free man, but are to be incumbered, and bound and fettered in your dealings with the plaintiff, by an agreement by which you are to make payment of some other debt previously due, I cannot become your surety, for most likely I shall be deceived.' It appears to me, that keeping back from the defendant the knowledge of the private agreement between the vendor and vendee was a fraud on the guarantee, and consequently this action is not maintainable."

Bayley, J. also, as to the duty of the creditor to communicate the real transaction to the surety, said, "There is no doubt it is the duty of a creditor, taking a guarantee for the solvency of another, to put the surety in possession of the real bargain between him and the principal, and if he neglects so to do, it is at his own peril."

178. From the case of *Peel v. Tatlock* (a) it appears, that a master who is defrauded by his clerk may carry his

(a) 1 Bos. & Pul. 419. See also *Harmer v. Rowe*, 6 M. & S. 146.

loss to the account of the clerk as a debt, and that his doing so will not discharge the clerk's surety. The case was as follows:—

The defendant was surety to a limited extent for Absalom Goodrich, as cashier in the plaintiffs' banking-house; Goodrich, having committed an embezzlement, absconded, and in consequence of a correspondence which the plaintiffs entered into with him subsequently, and which ended in their adoption of a plan for concealing the embezzlement from their other clerks, and making Goodrich debtor for the amount embezzled, the defendant contended he was not liable. At the trial it was left to the jury to say whether the plaintiff had waived the guarantie by making Goodrich's embezzlement a debt; which the jury negatived by finding a verdict for the plaintiffs. Upon a motion for a new trial, *Eyre*, C. J. mentioned three points, as points of law, the principal of which, and the only one which requires to be noticed here, is similar to the question left to the jury, namely, whether the credit given to Goodrich had not changed the character of the transaction, and, if so, whether, after the conversion into a debt of what was at first a delinquency, the surety continued answerable on the foundation of the original embezzlement? Eventually this question was thought immaterial to the case, and the Court came to no decision respecting it; but the following remarks of Mr. Justice *Buller* seem to afford a satisfactory answer to it in the negative:—"It has been said that the rights of the parties have been altered. If any new debt had been incurred, or if the demand had been enlarged, that might have been a fraud on the guarantee [guarantor]. But that is not the case here. The defendant was liable to make satisfaction for the embezzlement of Goodrich to the amount of his subscription, and if the plaintiffs endeavoured to obtain any thing from Goodrich before they called on the defendant, that was only in aid of the defendant, and tended to relieve him. Unless something had taken place between the plaintiffs and the guarantee,

I do not see how the responsibility of the latter could be given up, since no favour" (that is, favour by desisting from a criminal prosecution,) "shewn by the former to Goodrich, nor any thing done between them which did not create an injury to the defendant, could discharge the guarantie."

179. A surety cannot relieve himself from his obligation as surety, by giving notice to the creditor that he will not be answerable any longer.

In *Calvert v. Gordon (a)* the action was brought against the defendant as the executrix of Alexander Gordon, upon a bond conditioned for the fidelity of Richard Edwards, from time to time and at all times during his continuance in the service of the obligees, as their collecting clerk. The defendant pleaded that the service of Edwards was faithfully performed until after the death of Alexander Gordon, the obligor, and until after a period at which she averred she gave notice to the plaintiffs that she would not remain surety to them, or guarantee or indemnify them any longer. The fact of the notice, as stated in the plea, being admitted upon the record, it was urged as a ground for arresting the judgment of the Court, which in other points was in favour of the plaintiffs; the question therefore was, whether a surety, or his representative, could terminate his obligation by notice that he would no longer be liable; and the Court decided that he could not.

Per Lord Tenterden, C. J.—"The only question raised by the defendant's second plea is, whether it is competent to the surety to put an end to his liability by giving a notice which is to take effect from the very day on which it is given. It would be a hardship upon the master if this could be done. It is said that it would be a hardship upon the surety if his liability must necessarily continue

(a) 3 Manning & Ryland, 124; S. C. 2 Simon, 253. See also *Hough v. Warr*, 1 Carrington & Payne, N. P. C. 150; where *Abbott*,

C. J. in answer to a question by counsel, seems to have given a similar opinion.

during the whole time that the principal remains in the service; but, looking at the instrument itself, it would appear that it was the intention of the testator to enter into this unlimited engagement. It was competent to him to stipulate that he should be discharged from all future liability after a specified time after notice given. This he had not done."

180. In an action upon a bond (*a*), given by the sureties of a collector of taxes, the breaches assigned were, that the collector did not pay over money received, and did not duly demand and enforce payment of the taxes, and it was contended that some allowance ought to be made for the taxes of empty houses, and of persons who would have been unable to pay even had due diligence been used against them. But it being proved to be the duty of a collector to make a return of all distresses for taxes in arrear, and a return upon oath of all persons bankrupt or insolvent who were defaulters, which the collector had not done,

Lord *Tenterden*, C. J. ruled, that the defendant was not entitled to the allowance; for by the collector's omitting to make the returns, persons were enabled to run away, who would otherwise have been obliged to pay their taxes. The principle of this decision seems to be, that the surety is liable for all the consequences of every kind of default of his principal. Properly this case ought to have been put in the chapter "On the Extent of the Obligation of Surety."

181. The surety is not discharged by the creditor's signing the certificate of the principal debtor.

In *Brown v. Carr* (*b*), the plaintiff, a surety, claimed

(*a*) *Loveland v. Knight*, 3 Carington & Payne, N. P. C. 106.

(*b*) 7 Bing. 508; S. C. before the Lord Chancellor, 2 Russ. 600. In *Langdale v. Parry*, 2 Dowling & Ryland, 337, an action against a surety, one ground insisted on by

counsel for entering a nonsuit was, that the plaintiffs had proved their debt under a commission against the principal debtor, and signed his certificate: but the Court thought it insufficient.

relief on the ground that the defendants, the creditors, signed the certificate of the principal debtor after the plaintiff had given them notice not to do so. But the relief was refused, this not being deemed a ground for discharging the surety. Afterwards, the question was referred to the Court of Common Pleas, and *Tindal, C. J.* delivered the following judgment:—

“ Upon consideration of the question referred to us by his Honour the Master of the Rolls, whether the signature of the certificate of Barber, the bankrupt, by the defendants, his creditors, operates in law as a discharge to the plaintiff, who is surety for Barber's debt, we are of opinion that the legal liability of the surety is not thereby discharged. The ground upon which it has been contended that this proceeding amounts to a release is, the general acknowledged principle, that wherever the creditor so deals with his debtor as to alter the rights of the surety against the debtor, the surety is discharged at law. Thus, if a man is surety for the payment of the debt at a particular day, and the creditor extends the day of payment without the consent of the surety, his liability is destroyed. And the reason is, because the remedy of the surety against the principal may become more uncertain by postponement, because he became surety for the performance of one certain duty, and not for the other, which the creditor has thought proper to substitute for it of his own authority. The instance where the holder of a bill gives time to the acceptor without the authority of the drawer, and thereby discharges the drawer, is the most familiar; and as the consequence of signing the certificate of the debtor is, to release his person from the arrest of the surety, and his future effects from execution, the damage done to the surety by the act of the creditor, that is, supposing the debt to be paid, appears sufficient to give the surety the right to complain. In those, and in all similar cases, however, the act done by the creditor is his own act, over which the surety has no control; and the injury

which the surety would receive is one which he has no mode of preventing. But in the present case neither of those circumstances occur. The legislature has provided that the surety, if he pays the debt, may stand in the place of the creditor, where the creditor has proved, or may prove the debt himself where the creditor shall not have proved under the commission. It is the duty of the surety to pay the debt, and if he declines so doing, and thereby permits the creditor to prove, the signing the certificate of conformity, which is a power given by the statute to the proving creditor, cannot be considered as an act done by the creditor which altered the surety's right *without* his control, and scarcely, indeed, without his consent. It is not an act beyond his control, for he might have paid the money in due time, and prevented the creditor from proving; and if he voluntarily lies by, and omits the only means of preventing it, he may not unreasonably be considered to have assented to the act. Besides, the signing the certificate, where the creditor is satisfied that the bankrupt has conformed to the provision of the statute, is a moral obligation on the creditor; it is a power vested in him by the act, which he is morally bound to exercise where the truth of the case requires it. The exercise of such a power, therefore, by the creditor, where he is placed in the condition to exercise it, by the laches of the surety, cannot be considered as ranging itself under those voluntary acts of the creditor which release the surety. Indeed, the situation of a bankrupt circumstanced as the present would be very hard, if the notice given by the surety were to deprive the creditor, who has proved, of his right to sign the certificate. For the surety could not sign it at the time of the notice, and non constat that he would ever be able, as he may never pay the debt; so that, according to the surety's argument, the certificate could never be signed by the one or the other.

"We shall certify our opinion to the above effect to his Honour."

182. It has been seen (a), that the liability of a person as surety, is terminated by his becoming himself the principal debtor; for a man cannot be his own surety. Thus in *Thomas*, assignee of *Eaton*, v. *Da Costa* (b), the defendant had guaranteed Eaton that the firm of Rietti & Co., then consisting of Rietti and Sadler, should sell to the best advantage the goods which Eaton should consign to them. Sadler went out of the firm and the defendant entered it in his stead; "from which moment," said *Gibbs*, C. J. "there was an end of the guarantie, as he had become a partner with Rietti, and was, therefore, personally responsible."

183. If the creditor neglects to perform, or performs defectively, any of the conditions, either express or implied, which are incumbent upon him, or any of the terms which collectively form the consideration either of the surety's contract, or of the contract to which the surety acceded, the surety is discharged, or rather his liability never attaches.

In *Glyn v. Hertel* (c), the action was on the following guarantie:—

"Gentlemen, I have to offer to you my guarantie for the transactions in the account of Messrs. Spitta, Molling & Co. with your house to the extent of 5000*l*."

It was described in the declaration as a guarantie for a loan to be advanced by the plaintiffs to Spitta & Co. The evidence relative to the advance was, that at the time the guarantie was given, Spitta & Co. were indebted to the plaintiffs in a considerable sum of money, as a security for part of which the plaintiffs held some bills and a promissory note, of which Spitta & Co. were the makers; that, on receiving the guarantie, the plaintiffs cancelled the note and delivered up the bills; but the bills were immediately delivered back, with a new promissory note, and no money was advanced on the occasion. This transaction being

(a) *Antè*, p. 3.

(b) 2 J. B. Moore, 386.

(c) 8 Taunt. 208; S. C. 2 J. B.

Moore, 134.

considered by the Court not to amount to a loan, the defendant was held not liable.

184. So too, if two persons agree to guarantie in moieties a debt composed of a sum already advanced, and of another sum to be advanced; in case this sum is not advanced, it is clear the surety is not liable (*a*).

185. So where the guarantie stipulated for a credit of eighteen months to be given to the debtor, but the credit mentioned in the invoice was only twelve months, Lord *Ellenborough*, C.J. held, that unless the twelve months could be shewn to be mentioned in the invoice by mistake, the surety was not liable. "The claim as against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to shew that the terms of the guarantie have been strictly complied with. If I engage to guarantie, provided eighteen months credit be given, the party is not at liberty to give twelve only, and after the expiration of six more to call on me. If this invoice had been delivered at the same time with the goods, or if it had been delivered under a judge's order, the plaintiff would have been bound by it, but, under the present circumstances, I think he is at liberty to shew that it is a mistake" (*b*).

186. In *Simmons v. Keating* (*c*), the guarantie stipulated for six months' credit, and the invoice described the credit as "at three and three months' credit," meaning a bill at three months at the end of three months; and *Abbott*, C.J. said, "the credit under guarantie and bill of parcels is the same;" although it may be observed, where a bill is not given, six months is a period shorter by three days than where one is given.

187. In *Holl v. Hadley* (*d*), the plaintiffs declared on a guarantie for coals to be supplied to the brother of the defendant at a credit of two months from the delivery.

(*a*) See *Mayhew v. Cricket*, where a remark to this effect is made by Lord *Eldon*.

(*b*) *Bacon v. Chesney*, 1 Stark. N. P. C. 192.

(*c*) 2 Stark. N. P. C. 426.

(*d*) 5 Bing. 54; S. C. 2 M. & P. 137.

The witness called to prove the delivery stated, that the custom in the coal-trade was, for the merchant to deliver the coals to the dealer daily, and for the dealer at the end of the month to pay for the month's supply by a bill at two months; and in this manner the plaintiff had dealt with the defendant's brother; so that in fact, a credit of three months had been given for such of the coals as were delivered on the first day of the month, and a credit of more than two months for all the rest, excepting those delivered on the last day of the month. This was held not in conformity with the terms of the guarantie, and the plaintiff was nonsuited.

188. In *Evans v. Whyte* (a), the defendant guarantied the plaintiff to the extent of 50*l.* for the price of gold to be supplied to Evan Evans, a working goldsmith, in the course of his business; the Court was of opinion, that the guarantie applied only to gold supplied by way of sale; and as it appeared that the gold, for the price of which the action was brought, was paid together with money for certain bills of exchange, transferred by Evan Evans to the plaintiff without his indorsement, the Court, considering this not a sale of the gold, but a payment of it upon the purchase of the bills, held the defendant not liable.

Per Best, C. J. "This is an action on a guarantie touching the sale of gold from the plaintiff to Evan Evans; and it was understood between the parties that the gold furnished to Evan Evans was to be used in his trade. The question which has arisen is, whether gold advanced by the plaintiff, together with money for discounting bills for Evan Evans, is gold supplied within the meaning of the guarantie? I think it is not. The defendant only meant to pay for such gold as was sold to the original debtor; this was not sold by the plaintiff, but paid on the purchase of bills of exchange, and the cases cited clearly establish the distinction between payment for goods by

(a) 5 Bing. 485; S. C. 3 M. & P. 130. See also S. C. upon a new trial 1 M. & M. N. P. C. 468.

- bills, and transferring bills when they are discounted. This, therefore, was not a transaction within the meaning of the guarantie by which the defendant was proposed to be responsible for gold sold to Evan Evans in the way of his trade. Guaranties ought to receive a strict construction, and they should be so drawn up as to embrace in terms the dealing intended to be guaranteed."

189. In *Bulkely v. Lord (a)*, the plaintiff, an insurance broker, having refused to effect an insurance, under an apprehension that the proposed insurer would become bankrupt and would not pay the premium, the defendant guarantied the broker from any loss on the premium, should such bankruptcy take place. The plaintiff proved that the insurer, who was son of the defendant, had committed an act of bankruptcy, and that he owed a debt sufficient for a petitioning creditor; but no commission had issued, and the plaintiff was therefore nonsuited.

In the ensuing term it was moved to set aside the nonsuit, on the ground that the guarantie was meant to protect the plaintiff against the insolvency of the son, and that it was not intended to be a condition that a commission should issue; but the motion was unsuccessful.

190. Where the defendant undertook to be answerable for W. and J. Maunder, on their creditors undertaking not to issue against them a commission of bankrupt, or sue out process, before the 16th of August, it was held that an undertaking by all the creditors was a condition precedent to any liability arising on the part of the defendant (b).

191. The defendant had entered into a bond together with A., conditioned for the payment of such sum to B. as B. should recover in an action against A. B. having obtained judgment, A. brought a writ of error, pending which B. brought the present action on the bond; but the judgment below not being final, and the money consequently not being actually recovered, the action was held not maintainable.

(a) 2 Stark. N. P. C. 406.

(b) *Elworthy v. Maunder*, 5 Bing. 295; S. C. 2 M. & P. 482.

192. From the following case (a) it appears, that conditions must be performed strictly and literally, when a literal performance is possible, in order to charge the surety; and that a substantial performance, if different from a literal performance, is not sufficient. Sir James Cockburne had delivered to the plaintiffs below a set of bills drawn by himself on Colonel Cockburne of Bombay, at 60 days after sight, payable to the order of Douglas & Co.; and by Douglas & Co. indorsed, and also by Lauchlan Maclean and the defendant below. On the day the bills were delivered, Sir James Cockburne, Douglas & Co., Lauchlan Maclean, and the defendant below, executed to the plaintiffs below a joint and several bond, conditioned, that if the bills should be duly paid at Bombay according to their tenor, or be returned and come back to England duly protested for want of payment, and any of the parties should pay them within 30 days after notice, then the obligation should be void.

On the pleadings it appeared, that the bills were sent over to Bombay to be presented; that Colonel Cockburne, the drawee, was not there when they arrived, but at Janna; that, however, he had an attorney at Bombay, to whom they were presented by a notary for acceptance; the attorney refused acceptance, and the bills were protested for want of acceptance; but they were not protested for want of payment; and they came back unpaid with only a protest for non-acceptance. The condition, therefore, was not strictly performed, and, consequently, the Court of King's Bench (in error) held the defendant discharged from his engagement. Lord *Kenyon*, C. J. said, "It is enough to say that by these bonds the obligors undertook to pay the several sums of money for which the respective bonds were given, if a certain thing were performed in India, namely, if the several bills mentioned in the condition of those bonds were sent back to England duly protested for want of payment. The subsequent parts of this

(a) *Campbell v. French*, (in error), 6 Term R. 200.

record shew that these bills did come back to England, not having been duly protested in India, for want of payment, the respective parties on whom they were drawn, and who ought to have paid them, not being in India when the bills arrived there. It also appears on the record, that after the bills were returned to England, all the care that could be taken was taken to enforce the payment of them; but that payment could not be obtained. The question, therefore, is, whether that which was done in this case can be substituted in lieu of that which the parties to this contract undertook should be done before the bonds were to be enforced. It must be remembered that the plaintiff in error, who entered into these bonds, was not the original debtor; he was applied to to come in and add his security to the security of the different bills (*a*); and when he consented to enter into that security, he expressly stipulated as to the terms upon which he was to become responsible; and no one has a right to superadd any condition to the condition which he entered into, or to alter it."

His lordship then stated the law relative to conditions; namely, that if the condition be impossible, the bond becomes single; but if the condition be only improbable, it is a good condition; and, after shewing from Marius and other authorities that the condition for a protest on non-payment was possible, concluded as follows:—"That which was required by the plaintiff in error, when he entered into these bonds, even if capriciously required, should have been complied with before the bonds were put in force. The bills in question were protested for non-acceptance and might have been protested for non-payment in India. The plaintiff in error, who entered into the contract imposing these terms upon his contract, and subscribing it with that limitation and that condition, had a right to impose those terms, and if any person tell him that he acceded to other terms he has a right to

(*a*) The defendant was one of the indorsers.

answer, this is not my contract, non hæc in fœdera veni ; do not impose upon me other conditions than those I have imposed upon myself by the contract I have entered into." And, consequently, the Court of King's Bench reversed the judgment of the Court of Common Pleas, which was in favour of the plaintiffs, upon the grounds stated in the following judgment of *Eyre, C. J. (a)*:—" With regard to the language of the conditions stated in the pleadings, there is no ambiguity in it, nor any doubt as to the intent of the parties. The words are plain, that the money is to be payable here in the event of the bills being sent protested for non-payment. A protest for non-payment is perfectly intelligible and known ; and it is undoubtedly a different thing from a protest for non-acceptance ; that difference was so clearly demonstrated in the course of the argument, that it is not necessary for me now to point it out. With regard to any supposed difficulty having arisen, which prevented the returning the bills protested for non-payment, it is impossible to make out that there was any difficulty created by any body ; and, therefore, the question, by whom the difficulty was created does not arise ; in truth there was no difficulty at all ; it was in the power of the parties, whether the persons upon whom the bills were drawn were resident or not resident, to protest them for non-payment, as much in their power as it was to protest them for non-acceptance ; certainly, if it were material, there was no fault in the defendant, which prevented in any manner the plaintiffs from protesting these bills for non-payment. The question therefore is reduced to a single point : Have the plaintiffs shewn that they have substantially performed the conditions on their part to be performed, before the right to call for the performance of the conditions on the part of the obligor, or the penalty is to attach ? [It] depends upon this, whether we can construe a protest for non-payment, made here after the bills are returned for non-acceptance, to be *equivalent*

(a) See *French v. Campbell*, 2 H. Bl. 180.

to a protest for non-payment there, and the bills returned from thence with that protest upon them. I at first hesitated with regard to that, because it occurred to me that it might be very possible, that if the bills had been kept till they were due in India, they might have been paid there; that it was a very different thing, whether the payment was to be exacted there or here, because the bills might have been drawn upon a person who was only an agent, who, while he remained in India, might have effects in his hands, which effects might be liable to the payment of these bills, and which he might be willing to apply to the payment of them, and that when he came home he might leave those effects in the hands of other persons. . . But, upon consideration, I think that this would be assuming too much; these facts do not appear upon the record, and I think we can hardly take it for granted that the case was so, so as to establish a substantial difference between the presenting for payment and the protest for non-payment there, and the presenting for payment and protest for non-payment here. If we were to refine, we might refine to another conclusion, namely, that this whole business is neither more nor less than downright usury." And in conclusion, the learned judge said, "I agree upon the whole of the case, it seems reasonable to construe the protest *here*, to be a substantial performance of the conditions, by which, upon the bills being returned with a protest for non-payment, these parties are bound to pay the money expressed in the conditions."

193. In *Montague v. Tidscombe* (a) the plaintiffs were sued at law as the executors of Mr. Ewer, on a bond given by him to secure the fidelity of his son as an apprentice to the defendants. Concurrently with the execution of the bond, the defendants covenanted with Mr. Ewer that they would, at least once a month, see the apprentice make up his cash. The apprentice embezzled a considerable sum, and concealed the embezzlement by

(a) 2 Vern. 518.

inserting in his accounts goldsmiths' or bankers' notes as in hand, when he had disposed of them. The plaintiffs sought relief from the bond on the ground of the defendants not having performed their covenant. And the Lord Keeper being of opinion that the meaning of the covenant was, that the defendants should see not only the casting-up of the cash that it was right in figures, but see the cash effectually made up, decreed that the plaintiffs should be answerable for no more than the master could prove the apprentice to have embezzled in the period of a month from the time the embezzlement began.

194. In *Ogden v. Aspinall* (a), the plaintiffs claimed the amount of two bills of exchange for 490*l.* and 500*l.* respectively, which they had negotiated and afterwards paid, upon faith of the following guarantie of the defendant:—

“ Messrs. Ogden, Day & Co., New York. Gentlemen, I have given Mr. T. H. Hindley an order to purchase cotton, and as it may be to my advantage to have his bills on me negotiated through your house, I have in such case to request that you will honour his drafts, or make remittances to him to the amount of those he may send to you for sale *on my account*, and I engage that his bills on me so transmitted shall be regularly accepted and paid. Please to inform me the rate of exchange at which such bills are sold.”

As to the bill for 490*l.* it was stated, in a special case, to have been remitted by Hindley to the plaintiffs, for negotiation, in a letter in which he said, “ The bills now sent you are on account of a shipment of Sea Island Cotton, to Mr. N. Aspinall (the defendant), in the ship *Belvidera*, to sail on the 10th inst. to Liverpool.” But as to the bill for 500*l.*, it did not appear in what manner or under what representation the plaintiffs received it. And, therefore, the Court held the plaintiffs only entitled to recover the amount of the bill for 490*l.*

Abbott, C. J. said, “ I am of opinion, that the plaintiffs

(a) 7 Dowling & Ryland, 637.

are entitled to recover to the extent of the amount of the bill for 490*l.* drawn on the 8th of May, and the interest upon it; and no further. It has been urged, in opposition to their recovering even so far, that it was the duty of the plaintiffs to ascertain and satisfy themselves as a matter of fact, that the bill was drawn in respect of cotton purchased for and on account of the defendant; and that the terms of the guarantie expressly impose on them that duty. I think the guarantie will not admit of such a construction. The law does not require impossibilities of any man, and how was it possible for the plaintiffs, at a distance of 1,200 miles from Hindley, to know what was the real nature of the transactions he was engaged in, or to obtain any other description of the consignments, or the bills, than that which he thought proper to give them. They had no source of information but his letters; and if such a responsibility attached upon them, as has been contended for to-day, no man either could or would ever take upon himself the executing of a letter of credit, which would be a source of great inconvenience to the mercantile world. It does seem to me, however, that in order to sustain this action, the plaintiffs were bound to prove that the bills came into their hands in the regular and ordinary course of business from Hindley, and under his representation that they were drawn to meet shipments made on account of the defendant. With respect to the bill of 490*l.*, they produced evidence to that extent, because the fact that it came to them inclosed in a letter from Hindley, and the contents of that letter were quite sufficient to authorise them in believing that the bill was drawn on the defendant's account. But with respect to the bill for 500*l.* drawn on the 9th of May, they produced no such evidence; and it may be perfectly consistent with all that is found in the special case, that Hindley may have obtained from the plaintiffs an advance of money upon that bill without any reference to the former bill, or any connection with the transaction on account of which that was drawn. The

plaintiffs have, in my opinion, failed in bringing the latter bill, and the advance made by them upon it, within the fair operation of the guarantie, and, therefore, are not entitled to recover in respect of it. Upon the whole, therefore, I am of opinion that the verdict found for the plaintiffs ought to stand for the amount of 490*l.* and interest, and no more."

Whether a Covenant not to sue, given by a Creditor to the Principal Debtor, discharges the Surety.

195. A covenant not to sue, if given to a sole debtor, has the same effect as a release, and may be pleaded in bar of any action for the enforcement of the original obligation. But a covenant not to sue, given to one of several joint debtors, operates, not as a release (*a*), but merely as a covenant; and, consequently, if a joint action is brought against the covenantee and other joint debtors, the covenantee must, at law, submit, and he can have the benefit of the covenant only by means of an action upon it; and the other joint debtors cannot, as they might, had the creditor given a release, avail themselves of it.

Thus, in *Dean v. Newhall* (*b*), the defendant was bound with one Taylor, as his surety, in a joint and several bond, conditioned for the payment of a sum of money, which was not paid when due, and for which the bond was put in suit. At the trial it was proved, that after the bond was forfeited Taylor became insolvent, and assigned his effects to trustees for the benefit of his creditors; and in the deed of assignment the creditors, of whom the plaintiff was one, covenanted not to sue Taylor, and that if they did, those presents should be a sufficient release and discharge to all intents and purposes both at law and in equity. For the defendant it was contended, that this

(*a*) *Lacy v. Kynaston*, 12 Mod. 548; *S.C.* 1 Lord Raym. 688; *Hut-*

ton v. Eyre, 6 Taunt. 288; *Morley v. Friar*, 6 Bing. 547.

(*b*) 8 Term R. 168.

covenant operated as a release to Taylor, and, consequently, that it discharged not only him, but the defendant also; and upon this ground the plaintiff was nonsuited, but the Court set aside the nonsuit.

Per Lord Kenyon, C. J. "The last case (*Lacy v. Kynaston*)(a) to be sure removes all difficulty on this subject, and is a direct authority in favour of the plaintiff. I had only been doubting in my own mind on the strict law of the case; for that the honesty and justice of it are with the plaintiff cannot be doubted. Even if the defendant had succeeded here, a court of equity would have given the plaintiff full relief."

But in this dictum, I think it clear, that Lord *Kenyon* did not advert to the different character which the defendant would assume in a court of equity. At law, he appeared as a joint debtor, and could not appear otherwise, being prevented by the doctrine of estoppel from saying he was a surety: but in equity this doctrine does not prevail, and he might appear there as a surety, although, by the form of his engagement, he was a joint debtor, and, therefore, in equity, he could raise the question above proposed, whether the covenant not to sue had not discharged him as a surety; and, indeed, Lord *Eldon* (b) said, in reference to this very case of *Dean v. Newhall*, "it introduced the question whether equity would not under such circumstances relieve the surety."

196. In *Hutton v. Eyre* (c), *Gibbs*, C. J. referred to the above dictum of Lord *Kenyon*, and seems, in concurrence with the rest of the Court, to have been influenced by it: but in that case neither of the parties was properly a surety. The case was as follows:—

(a) *Ante*, p. 163, n. (a).

(b) Interloq. in *Hawkshaw v. Perkins*, 2 Swanst. 550. "I apprehend that I shall feel no difficulty on the doctrine as between principal and surety. If I mistake not, there is, in the Term Reports,

a decision that a covenant not to sue one of several co-obligors, is not, at law, a release of the co-obligors. That may introduce a question, whether such a covenant is not a release in equity."

(c) 6 Taunt. 289.

The plaintiff and defendant had been partners; they had prospectively executed articles of agreement for a dissolution of partnership, and mutually engaged not to do any act in the interim which should bind the other. The defendant, nevertheless, contracted debts which the plaintiff was obliged to pay as partner *de jure*, and, having paid them, he brought this action to obtain a reimbursement. The defendant, in answer to the action, relied on the fact, that the creditor, whom the plaintiff had paid, had covenanted not to sue him, the defendant; and he contended, that in virtue of this covenant they were also disentitled to sue the plaintiff; or that had they sued the plaintiff the covenant would have been a valid defence, and, therefore, that the plaintiff had paid the money in question voluntarily and of his own wrong. This defence was overruled; and in delivering judgment upon the case, *Gibbs*, C. J. made the following remarks upon the effect of a covenant not to sue:—"In the case of a creditor suing a single debtor, whom he has covenanted not to sue, it not only promotes the doctrine which so strongly prevails in the law, of preventing circuity of action, but it falls in with the intent of the parties, to hold that the covenant shall operate as a release; but it is impossible that it should here be in the contemplation of the parties, that, in covenanting not to sue Eyre, the insufficient debtor, he meant to release Hutton, who was sufficient. It was as easy to insert in the deed a release as a covenant not to sue, and it would have been shorter; it must be inferred that the parties did not insert a release, because it would release Hutton also; but it is this day contended, that a covenant not to sue has the same effect. Where the words, by being extended beyond their obvious intent, would, as it seems, go beyond the intent of the party, the Court ought not to put that construction on them. It was urged at the bar, that the creditors might sue Hutton alone, and non constat that he would plead in abatement; but putting that out of the case, we think the rule, that a covenant

not to sue operates as a release, applies only to cases where the covenantor and covenantee are single." And then with reference to Lord *Kenyon's* dictum, the learned Chief Justice said, " Another ground on which we found our judgment is this, Lord *Kenyon*, C. J. in *Dean v. Newhall*, says, ' Even if the defendant had succeeded here, a court of equity would have given the plaintiff full relief.' I am glad to find by the two cases cited, that we are fully warranted in deciding in favour of the plaintiff on legal grounds. Here, if the plaintiff had paid this money either under the fear of process of a court of equity or of a court of law, unquestionably he could have recovered it from the defendant; and if a court of equity would have restrained the plaintiff from setting up this covenant as a release, the equitable call on him justified him in paying the money and gave him this remedy over against the defendant."

197. This case and that of *Dean v. Newhall* are examples of the only cases at law bearing any relation to the present question. No case has occurred in which the party defending himself, on the ground of a covenant not to sue being given to some other party, was, in estimation of law, a surety of that party. In *Hutton v. Eyre*, the plaintiff, on whom the defendant wished to throw the burden of that defence, was not a surety with relation to the creditor, whom he had paid, although with relation to the defendant he had some of the rights of a surety. It may also be remarked, that the argument, that a creditor's giving a covenant not to sue, when he might as easily give a release, must be referred to an intention to reserve his rights against the *other joint debtors*, is inapplicable to the case of one who is essentially a surety; for, 1. In equity, the form of the engagement is not regarded, but a joint debtor is admitted to all the defences of a surety, if by the essence of his contract he is only a surety; and, 2. Being regarded as a surety, the supposed intention of the creditor to reserve his rights against

him cannot take effect, because a reservation of a right to proceed against the surety is void, if the creditor has parted with the corresponding right against the debtor: and if it is said, that the creditor, by giving a covenant cannot be considered as parting with his right to sue the debtor, seeing he may still sue him at law jointly with the other co-debtors, I reply, it is not enough that he retains his right to sue the debtor jointly, but he must retain his right to sue him singly; for, where there are only two joint debtors, that is, the real debtor and the surety, the latter, by going into equity and paying the debt into Court, or as the Court may direct, may sever his liability; after which, the creditor would be obliged in equity to sue the real debtor, not joining the surety, which he could not do, because the debtor, if sued singly, might plead the covenant in bar to the action; and, consequently, by such a covenant the creditor parts with the right to sue the debtor in the manner in which he ought to sue him, according to the equitable right of the surety; and being unable to exercise the obligation to sue, which is correlative to the right of the surety to call on him to sue, he has discharged the surety.

Apart from technical views, a covenant not to sue a debtor is in all cases substantially a discharge of the debtor, for in case the debtor is sued jointly, and the creditor recover, he may obtain upon the covenant a reimbursement of the debt or sum recovered; and so, in the result, the covenant is the same to him as a release.

An agreement to give the principal time discharges the surety. Now a covenant not to sue for twelve months would seem to be in effect an agreement to give time. And if so, a covenant not to sue, without saying for what period, is an agreement to give time indefinitely. And as the surety is discharged by the creditor's agreeing to give the debtor a day, *à fortiori* he is discharged by the creditor's agreeing to give FOR EVER. Or, such a covenant may be considered as an agreement to give time

until it shall be the pleasure of the creditor to break his covenant. But surely, in equity, the stipulation of a right to break a covenant, for the breach of which the covenant entitles the covenantee to a full indemnity, cannot be held good, so as to continue the liability of the surety. Such a stipulation resembles the reservation already alluded to, which has been decided to be void as against a surety. From these considerations, all of which, I am aware, have not the same weight, though all of them, I think, have some weight, the conclusion presses on my mind irresistibly, that a covenant not to sue, given by a creditor to the principal debtor, will, in equity, discharge the surety.

Whether, in case the Debtor gives his Creditor a Bill of Exchange to which the Surety is not a Party, the Surety is discharged by such Laches on the part of the Creditor as would undoubtedly discharge him if he were a Party.

198. In *Warrington v. Furber* (a) the action was brought to recover a sum of money which the plaintiffs had paid for the defendants as their surety. The chief ground of defence was, that the defendants had accepted a bill for the debt drawn on them by the creditor, which had never been presented for payment, and that consequently the creditor could not have recovered on the guarantie, and therefore that the plaintiffs had paid the debt in their own wrong, and were not entitled to be reimbursed by the defendants. On the other side it appeared, that when the bill became due the defendants were bankrupts. Lord *Ellenborough* was of opinion, that this not being an action upon the bill, strict proof of a presentation for payment was not necessary, especially as it was obvious that it could have been of no avail, the defendants, the acceptors, having been then recently stripped of all their property. And upon motion to set aside the verdict given for the

(a) 8 East's R. 242.

plaintiffs, Lord *Ellenborough*, upon the same point, said, "The same strictness of proof is not necessary to charge the guarantees as would have been necessary to support an action upon the bill itself, where by the law of merchants a demand upon and refusal by the acceptors must have been proved, in order to charge any other party upon the bill, and this notwithstanding the bankruptcy of the acceptors. But this is not necessary to charge guarantees, who insure, as it were, the solvency of their principals; and therefore, if the latter become bankrupt and notoriously insolvent, it is the same as if they were dead; and it is nugatory to go through the ceremony of making a demand upon them. The plaintiffs might fairly have said to Martin (the creditor) that the acceptors being insolvent, and their effects being assigned for the benefit of their creditors, they (the plaintiffs and sureties) would not put him to the proof of a demand upon the acceptors, which must have been fruitless, but would pay the money at once, and look to their remedy over."

Mr. Justice *Grose* declared himself of the same opinion, and said that the necessity of a demand, notwithstanding the bankruptcy of the acceptor, in order to charge the drawer or indorser of a bill, was founded solely upon the custom of merchants.

Upon the same point also *Lawrence, J.* said, "That though proof of a demand on the acceptors, who had become bankrupts, was not necessary to charge the guarantees, yet the latter are not prevented from shewing that they ought not to have been called upon at all, for that the principal debtors could have paid the bill if demanded of them."

And *Le Blanc, J.* said, "There is no need of the same proof to charge a guarantee as to charge a party whose name is upon a bill of exchange; for it is sufficient as against the former to shew that the holder of the bill could not have obtained the money by making a demand upon the bill."

199. In *Phillips v. Astling* (a) the defendants were sued on the following guarantie:—"We jointly and severally undertake to guarantee the payment of 500*l.* at 5 per cent. by a bill drawn on G. Houghton by Davenport and Finney." The declaration stated, that in consideration that the plaintiff would sell and deliver Davenport and Finney certain goods (b), to be paid for by a bill drawn by them on Houghton at six months, the defendants undertook to guarantee the payment of the bill; and there were averments of the delivery of the goods, of the acceptance of the bill, of its *presentment for payment*, and its dishonour. But, in point of fact, the bill when due was not presented for payment, and this was one of the grounds relied on by the defendants in answer to the action. The question therefore was, whether the defendants, as sureties, were discharged by the creditor's neglect to present the bill duly for payment: and *Mansfield*, C. J. in the course of a judgment embracing other topics, spoke with reference to this as follows:—"It was urged, and, as we think, justly, that this was a general guarantie for payment of a bill, not, as usual, a guarantie that the acceptor should pay, but a contract that either the one or the other (c) should pay; and the consequence is, that if the guarantee paid the bill, he would have a right to come both on the drawer and acceptor for repayment; and though want of notice would not discharge the acceptor, yet the guarantee, as (d) the holder, had a right to insist on due notice being given to himself of non-payment by the acceptor, and that as to

(a) 2 Taunt. 206.

(b) The only consideration mentioned in the guarantie is the "5 per cent.:" this variance in the declaration, had it been objected to, probably, would have been held fatal.

(c) By "either the one or the other," is meant, I think, either the acceptor or the drawer.

(d) This is unintelligible. If I may be allowed to conjecture, I should say, that the proposition really put was, that, as towards the holder, the surety, being surety to him not for the payment of the debt, but of the bill, was entitled to notice from *him*, that the bill was dishonoured.

the drawers, he had a right to insist *on notice being given to them* of the same fact, for that he might pay it in his own wrong if they were discharged." And then, after adverting to another point, the learned judge distinguished this case from that of *Warrington v. Furber*. "That case," said he, "also arose on a guarantie, and Lord *Ellenborough* expressed the opinion of the Court, that although the insolvency of the parties to a bill would not in general dispense with the necessity of presenting it for payment, yet where it was obvious that it could not avail, the same strictness of proof was not necessary to charge a guarantee; and therefore if the parties become bankrupts and notoriously insolvent, it was the same as if they were dead. Now that case was decided on the ground, that the pursuing the course of applying to the acceptor in that case, as here to the acceptor and drawer, would have been of no effect, because there the bankruptcy had already happened before the bill became due. Here the insolvency did not occur till long after the bill became due, and Houghton's bankruptcy was long after that. For any thing then that appears, if this gentleman had demanded the money either of the acceptor or the drawer, the bill might have been paid. That too was a guarantie for payment of the price of goods, *this is for a bill; and the contract necessarily implies that the defendants will pay it if the plaintiffs (a) do not, being called on in a proper manner*; and therefore, although that case has relaxed the strictness of proof of presentment and notice, and seems to decide that it is not necessary to pursue the same strictness in order to charge a guarantie as to charge the drawer of the bill, yet it may still be inferred from it, that if the necessary steps are not taken to obtain payment from the parties who are liable on the bill and solvent, the guarantie must be discharged; and therefore the rule for a nonsuit must be made absolute."

200. In *Murray v. King* (b) the plaintiff discounted a

(a) "Plaintiffs;" evidently a misprint; probably, instead of "parties."

(b) 5 Barn. & Ald. 165.

bill for Tuffnell, of which Tuffnell was the drawer, and the defendant an indorser. The present action was upon a bond, conditioned for payment of the bill one month after it should become due, if it was not previously paid by the acceptor. The defendant pleaded that the bill, when due, was not presented to the acceptor. But the Court, advertng to the circumstance of the defendant's being an indorser of the bill, and as such liable upon the bill itself, had it been presented, inferred that the object of the bond was to make the defendant liable even in case the bill was not presented, and so to secure the plaintiff at all events, and against this or any other kind of laches. "I have had," said *Bayley, J.* "considerable doubts in the course of this argument, but my mind is at length come to the conclusion that the pleas are bad, and that the plaintiff is therefore entitled to recover. In this case Tuffnell and King were the drawers and indorsers of the bill of exchange, and the condition is, that if the bill be not paid when due, for the payment of which by the acceptor they have become sureties, they would pay or cause to be paid the bill within one month after it became due and was not paid by the acceptor. It is, therefore, conditioned for their own acts in case of a given event, namely, the non-payment by the acceptor. Now the acceptor has not paid the bill in money, nor have Tuffnell and King done so. The bond, therefore, is forfeited, unless the neglect to present the bill to the acceptor, and the want of notice to the other parties, be considered by the Court as an equivalent to actual payment. Now I think this was not the intention of the parties to this bond. If no bond had been given, laches on the part of the holder would have exonerated Tuffnell and the defendant, and one object of the bond might, therefore, have been to exonerate the plaintiff from such a risk. It was very easy for Tuffnell and King to ascertain by inquiry whether Tyrrell had paid the bill; and I think the meaning of the words in this condition was to throw upon them this obligation."

Abbott, C. J. also said, "It is contended by the defendant's plea, that we are to engraft upon this bond those limitations which the law imposes upon the holders of bills of exchange, namely, a due presentment to the acceptor, and a notice of dishonour to the drawer and indorser. I am of opinion that we ought not so to do. I do not rely on the case of *Warrington v. Furbor*, because that case has been broken in upon by the case of *Phillips v. Astling*. But there is a main distinction between those cases and the present; for in both of them the guaranties were given by persons not interested as parties to the original instrument. But here the bond is given by Tuffnell and the defendant, who were both parties to the bill." And from this circumstance the learned judge proceeded to draw the inference contained above in the judgment of Mr. Justice *Bayley*.

201. In *Holbrow v. Wilkins* (a) the defendant was a commission agent to the plaintiffs, and had guaranteed to them half the price of certain wool sold by him on their account, and for which the purchaser had accepted a bill at six months. This bill when due was not presented for payment, in consequence, it is alleged, of the insolvency of the acceptor; and the defendant contended he was discharged from the guarantie by the non-presentment. But the Court decided the contrary:—*Bayley*, J. on the ground that the defendant was not a party to the bill, and that therefore the case of *Swinyard v. Bowes* (b) was precisely in point against him: and *Abbott*, C. J. on the ground that the defendant had had notice before the bill

(a) 2 D. & R. 59; S. C. 1 B. & C. 10.

(b) The case of *Swinyard v. Bowes*, (5 M. & S. 62,) was an action for goods sold. The defence was, that the plaintiff had drawn on Chesner, a debtor of the defendant, for the amount, and had given no notice of the dishonour

of that bill. But *Bayley*, J. at the trial, and the Court afterwards, thought the defendant not within the custom of merchants, because he was not a party to the bill; and that as he was not prejudiced by the want of notice, it was not a sufficient defence.

was due that the acceptor was insolvent, and that the plaintiffs would look to him for payment.

Per Abbott, C. J.—"The present case is perfectly distinguishable from both the cases which have been relied upon in support of the application. In *Phillips v. Astling* the insolvency of the drawers of the bill took place *subsequently* to the period when the bill became due, and there was no evidence that the bill, if presented, would not have been paid. In *Murray v. King* the guarantie was to pay the bill itself if it should not be paid by the acceptor. In the present case the insolvency of the acceptors takes place *before* the bill becomes due, and the guarantie is to secure one half of the amount of the debt, without any reference to the bill itself. It has been decided repeatedly, but particularly in the cases of *Warrington v. Furber* and *Swinyard v. Bowes*, that a guarantee of a debt secured upon a bill of exchange, to which he is not a party, is not entitled to notice of the dishonour of the bill; for 'the same strictness of proof is not necessary to charge a guarantee as would be requisite to support an action upon the bill itself.' Then what is the conduct of the defendant in this case? He enters into a guarantie of half the debt; the debtors are notoriously insolvent; and when called upon to perform his guarantie, he repudiates his engagement altogether, and denies his liability. I think there is no ground for disturbing the verdict."

The rest of the Court were of the same opinion; and Mr. Justice *Holroyd* said, "This case is not to be governed by the rules applicable to bills of exchange. There is an old case, in Lord *Manfield's* time, where a person paid away a bill and refused to indorse it, but he gave an undertaking to be answerable for the payment when it became due. There was an objection as to the want of notice of the dishonour, he being (it was contended) the indorser; but the Court said that notice was not necessary in such a case; and the distinction taken

was, that by the custom of merchants the indorser of the bill was not entitled to notice unless he put his name upon it. But, independently of the custom of merchants, if *A.* undertakes to guarantee the payment of the debt of *B.*, he is bound to see that *B.* does pay. The undertaking in this case is, *not that the defendant will pay the bill, but that he will pay half the amount of the money for which the goods are sold.* Here the vendees of the goods have become in fact bankrupts, and they had stopped payment before the bill became due. Of this circumstance the defendant received notice from the plaintiffs, and they had a right to resort to him on his guarantie, without reference to the question whether the bill would be productive or not. I think, therefore, that in this case the plaintiff is liable upon his guarantie. The circumstance of Carver and Peat (the debtors) becoming insolvent before the bill became due, makes the whole difference between this and the cases which have been cited."

202. In *Van Wart v. Woolley* (a), Abbott, C.J. in giving judgment, spoke of the cases of *Warrington v. Furber*, *Phillips v. Astling*, and *Holbrow v. Wilkins*, as follows:—"In the course of the argument the situation of Irving & Co. was compared to that of a guarantee. The decisions that have taken place in actions brought against a guarantee, warrant the proposition that has been before mentioned, namely, that the nature of the transaction and the circumstances of the particular case are to be considered. Thus, in *Warrington v. Furber*, where a commission had issued against the acceptor before the bill became due, presentment for payment to him was held unnecessary, in order to charge the guarantee. *Phillips v. Astling* stood upon different grounds. In that case the bill was not presented for payment when it became due, as it ought to have been. Two days afterwards, notice that it was still unpaid was given to the drawer, for whom the defendant was guarantee, but no notice was even then

(a) 5 D. & R. 374; S. C. 3 B. & C. 439.

given to the defendant. The drawer and acceptor continued solvent for many months after the bill was dishonoured, and it was not until they became bankrupts that any claim was made on the defendant. Under these circumstances, because the necessary steps were not taken to obtain payment from the parties to the bill while they continued solvent, the Court of Common Pleas held the guarantee to be discharged. In *Holborow v. Wilkins* the acceptors were known to be insolvent before the bill had become due, and some days after that fact was known, the plaintiffs wrote to the defendant and desired him to accept a new bill, which he refused to do. The bill was not presented for payment when due, nor was any notice of the non-payment given to the defendant. It appeared that the bill would not have been paid if presented; and it did not appear that the defendant had sustained any damage by reason of the want of presentment and notice, and this Court held the guarantee not to be discharged. These decisions shew that cases of this kind depend upon the circumstances peculiar to each."

203. Without questioning, in any degree, the correctness of these decisions, as to the result; only one, that of *Phillips v. Astling*, seems to me to rest on grounds which are adequate. It is a general principle of the contract of surety, that the surety becomes discharged by the discharge of the principal debtor: whenever, therefore, the principal himself, as a party to the bill, would be discharged from the debt for which the bill is given, by reason of any laches of the creditor in respect of such bill, the surety also, according to this principle, would be discharged. Is the principal the acceptor of the bill? he is not discharged by its non-presentment when due for payment; neither, as it seems to me, is his surety, upon any principle either of the contract of surety, or of the law merchant. Is the principal the drawer, or an indorser of the bill, and the bill not presented when due to the acceptor for payment? he is himself discharged; and, therefore, in this case, as it

seems to me, so, in general, is his surety; and not only upon this ground, but also because by the non-presentment of the bill the surety is deprived of that benefit from it which he might have claimed under the rule which entitles him, upon paying the money, to have all the collateral securities of the creditor enforced in his favour. And it may here be remarked, that the decisions of *Warrington v. Furber* and *Phillips v. Astling*, according to this principle, are consistent with one another; for, in the former, the principal was not discharged by the non-presentment of the bill for payment, he being the acceptor; but, in the latter, he was discharged because he was the drawer; and it may be added, would have been discharged, even had his guarantie been for payment of the price of goods, instead of for payment of a bill (a). And this leads me to remark a difference in the consequences of the two principles, the general principle and the principle upon which *Phillips v. Astling* was decided. For, the Court having held in that case, that a guarantie for payment of a bill necessarily implies that the surety is to pay only in case the parties to the bill have been called upon in a proper manner, it follows, that if the acceptor has not been called upon in a proper manner the surety is discharged, whether he is surety for the drawer or for the acceptor. But, according to the general principle, a surety for payment of the price of goods is discharged by non-presentment of a bill given by his principal, only when his principal himself is discharged, that is, only when his principal is the drawer or an indorser, and not when he is the acceptor.

I am unwilling to quit this subject without adverting more particularly to the grounds of the decision in *Warrington v. Furber*. It has been seen (b), that Lord *Ellenborough*, in that case, said, "that the sureties, knowing the acceptor to be insolvent and without effects, might

(a) See this distinction taken by repeated by *Holroyd, J. antè*, p. 175.
Mansfield, C. J. antè, p. 172; and

(b) *Antè*. p. 170.

fairly have said to the creditor, that they would not put him to proof of a demand upon the acceptor: implying that it was in their discretion to put him to such proof, or, in other words, that they might have taken advantage of the neglect to present the bill for payment to their principal, the acceptor, as a ground of discharge, had they thought proper: and Mr. Justice *Lawrence*, only varying the expression of this sentiment, said that sureties would entitle themselves to be discharged by showing that their principal could have paid his acceptance had it been presented: and Mr. Justice *Le Blanc*, presenting another variation of expression, said, "that if the surety objected, on the ground of a non-presentment to his principal, the acceptor, the creditor might destroy the objection, by shewing that a presentment would have been fruitless." But it seems to me, that if the guarantie is not "for a bill," according to the distinction taken by *Mansfield*, C. J. (a), a bill acquired by the creditor afterwards is merely an additional security; and I am at a loss for the principle, which, in the case of a bill held as an additional security, would entitle the surety to his discharge for any cause connected with the bill, not affecting the liability of the principal debtor. One principle is, that the surety is entitled, upon paying the debt, to the benefit of all collateral securities held by the creditor; and he is entitled to expect that the creditor will hold them for his benefit, and do no act to impair their value. But the creditor, on the other hand, may hold them passively. It is enough if he keeps his right to sue upon them unimpaired, so that he can convey an unimpaired right to the surety, when the surety entitles himself to call for it. His right to sue an acceptor is unimpaired, notwithstanding his non-presentment of the bill for payment. The surety, therefore, is not discharged by the non-presentment, and if he loses the fruit of his right by the insolvency of the acceptor, the blame is imputable only to himself for not paying the debt himself

(a) In *Phillips v. Astling*, *antè*, p. 172.

before, and so entitling himself to have the acceptor sued at the time he fancies a suit might have been beneficial for him.

CHAPTER VI.

OF THE DISCHARGE OF DRAWERS AND INDORSERS, AS SURETIES.

204. A bill is an undertaking by the acceptor, and a note by the maker, to pay the sum named, at all events; and each subsequent party, by his indorsement, undertakes to pay it upon the default of any prior party. Hence, by the nature of these instruments, each subsequent party is a surety for every prior one; the drawer for the acceptor; the second indorser for both the drawer and acceptor; the third indorser as well for the second as for the drawer and acceptor, and so on. And, in like manner, each indorser of a note is a surety for the maker and all the other prior indorsers.

205. Accordingly, the same causes which discharge sureties, who are such by the common contract of guarantee, discharge drawers and indorsers.

Thus, in *English v. Darley* (a), the defendant was the indorser of a bill of exchange; the bill, when due, was dishonoured; in consequence of which, the plaintiffs commenced an action against the acceptor, and also against the present defendant; and in that against the acceptor, he obtained judgment and took out execution, but instead of proceeding with the execution he accepted 100% on account, and a bond and warrant of attorney for the payment of the residue by instalments. By this transaction he was held to have discharged the defendant, the indorser.

206. There are two points of view in which agreeing to

(a) 2 Bos. & Pul. 61.

give time to the acceptor, or, which is the same thing, the principal debtor, is held to discharge an indorser, or surety. According to one, the creditor, by agreeing to give time, is regarded as having disintitled himself to proceed against the debtor until the time agreed to be given is expired. But an agreement which has such an effect is inconsistent with the obligation of the creditor to sue the principal debtor at any moment, when called upon to do so, by the surety: and the creditor's voluntary disablement of himself for the performance of this or of any obligation which he is under towards the surety, discharges the surety. According to the other, he is regarded as having, in point of good faith towards the debtor, obliged himself not to proceed against the surety; because supposing him to proceed against the surety, and the surety to pay, the surety would be entitled instantly to proceed against the debtor; and so, through the medium of the surety, he would deprive the debtor of the time which he agreed to give him, and, therefore, to preserve good faith he shall not proceed against the surety.

These grounds are successively stated by Lord *Eldon*, C. J. in the following passages of his judgment in *English v. Darley*:—1. "If an holder enters into an agreement with a prior indorser in the morning not to sue him for a certain time, and then obliges a subsequent indorser to pay the debt, the latter must immediately resort to the very person for payment to whom the holder had pledged his faith that he should not be sued." 2. "We all remember the case where Mr. Richard Burke, being co-surety for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the co-surety, because he must, by so doing, enforce a payment from the principal contrary to the agreement. Here, the plaintiff, having taken a new security from the acceptor, has discharged the defendant."

207. It may be said, that this reasoning is inapplicable where the agreement to give the debtor time, is made under a reservation of the instant right to proceed against the surety; and if the creditor exercises that right, and so the debtor loses the benefit of the agreement, the loss is only the consequence of a condition to which he consented (a). But to this it is replied, that if the agreement

(a) In one of the valuable notes to the excellent reports of Messrs. Manning & Ryland, it is said, (see *Malby v. Carstairs*, 1 M. & R. 562), "In general, a creditor who, by any contract which can be enforced against him at law or in equity, gives time to his debtor, discharges the surety; for if, notwithstanding such contract, it were competent to the creditor to sue the surety, the latter would immediately have his remedy over against the debtor; this would be in fraud of the contract of forbearance, which the creditor would thereby indirectly defeat; but where the debtor assents to the reservation of the right to resort to the surety, he cannot complain, he has not obtained an absolute discharge, for which he never contracted:" and *Boulbee v. Stubbs*, 18 Ves. 20, is referred to as an authority for this view of the effect of the reservation alluded to. In *Boulbee v. Stubbs*, however, the creditors having agreed to give time to the debtor, were restrained from suing the surety, although their agreement to give time was made "without prejudice to any of their securities." *Per* the Lord Chancellor, "The answer given" (to the argument that

the surety is discharged by the agreement to give time to the principal debtor), "is, that by the agreement, reserving the creditor's remedy against sureties, the situation of the surety is not varied: and this doctrine has been held at law as well as here; but I agree, that a stipulation of that kind is in many cases so very absurd, that it must be plainly seen; and the true question is, whether these words in the warrant of attorney, 'without prejudice to any security,' mean that this bond was saved against the surety, the demand upon which was intended to be arranged by that very transaction; or whether the meaning of these words is not, that the principal debtor being in the habit of giving securities to the creditor from time to time, this transaction should liquidate the matter of the bond; but should not prejudice the banker's right as to other securities in his hands. If that is the meaning of this transaction, it puts an end to the right against the surety; if on the other hand the object was to give as extensive a remedy as was given in Mr. Burke's case, then that case and many others must govern this."

is sincere, the reservation is absurd, and must be held null on the ground of its repugnance to the agreement. The reservation here spoken of, and the object of which is to continue the liability of a mere surety, must not be confounded with a reservation of "securities," the validity of which is a question not at all dependent on the principles of suretiship (a).

208. But the drawer is not discharged by an agreement to give time to the acceptor, if he consented to it. Thus, in *Clark v. Devlin* (b), where it appeared that the holder of a bill, payment of which had been refused, informed the drawer of his intention to take from the acceptor security for payment by instalments, and the drawer answered, the holder might do as he liked, for that he was himself discharged already for want of notice; when in fact he was not discharged, due notice having been given; it was held, that he also was not discharged by the plaintiff's giving time to the acceptor, because his answer was thought to amount to an assent to the plaintiff's taking the warrant of attorney from the acceptor.

In this case, Lord *Alvanley*, C. J. said, "If the holder of a bill, without the knowledge of the other parties, give time to the acceptor, he cannot afterwards call on the other parties without an injury to the person to whom he has given time. In such case, therefore, those parties will be discharged. But a man is not bound to seek his remedy against the acceptor; if he sign judgment against him, he will not be bound to prosecute that judgment; but he must take care that he does not give the acceptor a defence against the drawer."

This remark, that he must take care not to give the acceptor a defence against the drawer, implies, that if the holder agrees to give time to the acceptor, the acceptor may use it in his defence as well against the drawer, sup-

(a) See *post*, *Ex parte Glendinning*.

(b) 3 Bos. & Pul. 363. See

Withall v. Masterman, 2 Camp. N. P. C. 178.

posing the drawer to pay the bill before the time expires, as against the acceptor.

209. In *Walwyn v. St. Quintin* (a), *Eyre*, C. J. said, "Merely proposing to take a security from the acceptor, would not discharge the subsequent parties unless the proposal was evidence of laches. If the holder enters into a new agreement with the acceptor for securing the payment of the bill, that may satisfy the bill as between him and the drawer, and may be considered as a new credit to the acceptor. There was in this case a treaty for such security, but it went off. Proposals for a security bind no one, unless they can be made use of to impute laches" (b).

210. If the holder merely takes a new security from the acceptor, as a collateral security, and without agreeing to give him time, or without the intervention of circumstances from which a jury would infer such an agreement, he does not discharge the drawer and indorsers.

In *Pring v. Clarkson* (c), the action was upon a bill for 86*l.* 8*s.* 7*d.* by the indorsee against the drawer; the bill was at four months after date, accepted by J. T. Thompson, and payable to the order of Messrs. Gidden & Son. At the trial it appeared that the bill was drawn and accepted for value; and Gidden & Son, the payees, had indorsed it to Mr. Baker, in whose hands it was when it became due and was dishonoured. Immediately after the dishonour, Thompson, the acceptor, sent to Gidden & Son, the payees, another bill for 126*l.* which had some time to run, and which was indorsed by himself and accepted by a third person. With this bill Gidden & Son took up the old one, receiving at the same time the difference between the two in cash from Mr. Baker; and then Gidden & Son indorsed the old bill to the plaintiff, who was not aware it

(a) 1 Bos. & Pul. 652.

Badnall v. Samuel, 3 Pri. 521.

(b) To the same effect are the remarks of Mr. Baron Wood, in

(c) 2 D. & R. 78; S. C. 1 B. & C. 14.

had been dishonoured. It did not appear that Gidden & Son had in any way undertaken not to sue upon the old bill, or to give time to Thompson, the acceptor, but it was contended, on behalf of the defendant, that the mere taking of the second bill of 126*l*. was a giving of time, and discharged the defendant, the drawer. The learned judge thought the objection not tenable, and directed the jury to find for the plaintiff, with liberty, however, to the defendant to move to enter a nonsuit. Upon motion, the Court refused to disturb the verdict.

Abbott, C. J. said, "The question in this case is, whether Gidden & Son, by taking the second bill, did, in fact, consent not to sue upon the first until the second was due. That was a question for the jury, but it was not so put to them on behalf of the defendant. It was put to me entirely as a question of law, and I was of opinion, that, unless they consented not to sue upon the bill in question until the bill for 126*l*. became payable, the defence set up would not be available. The safest course in this, and similar cases, is, to rely upon some broad and plain rule. The broad and plain rule hitherto laid down in such cases is this; if the holder of a bill of exchange consents to give time to the acceptor, he thereby discharges the other parties to the bill. I am of opinion in this case, that the defendant is not discharged merely by the fact of Gidden & Son taking another security, without any proof of a consent on their part not to sue upon the first until the second bill became due. No such consent was proved, and, therefore, I think the case must be governed by that circumstance."

Bayley, J. said, "I am of the same opinion. This was more a question of fact than of law, namely, whether at the time when Gidden & Son took the second bill of Thompson, they consented to delay their remedy upon the first until the second became due. If that fact had been satisfactorily established it would undoubtedly have been a discharge of the defendant, but as that fact has

not been proved, it makes all the difference in the case. I see no reason why Gidden & Son should not have been at liberty to take the second bill as a collateral security. There is nothing before us to show that Gidden & Son did in fact agree to give time to the acceptor, but we are called upon to draw this inference from the mere circumstance of this bill having been given by the acceptor. No such inference can be drawn, unless it arises from the fact. The mere sending the second bill by Thompson does not restrain Gidden & Son from negotiating or suing upon the first, unless there is an express consent for that purpose. If the facts proved in this case amounted to giving time to the acceptor, the argument which has been urged on the part of the defendant would have been perfectly correct, but that is a question of fact, and there is nothing to support it in the case. The circumstance of Gidden & Son having discounted the second bill, and sending it forth into the world, makes no difference; for, if at any period before it became due, they had any reason to believe it would have been dishonoured, they had a right to take up the bill again, and send it back to Thompson. My opinion in this case is founded upon the want of proof that Gidden & Son had bound themselves not to sue upon the first bill until the second was at maturity."

211. This case is, I believe, one of the first, in which it is distinctly viewed to be a question for the jury, in all cases, and not a question of law, whether there has been an agreement. Might it not rather be said to be sometimes the one, and sometimes the other? Whether there has been an express agreement to give time is simply a question of fact; but if the evidence is merely of circumstances contended to be tantamount to an agreement, or to constitute, according to legal phraseology, an implied agreement, the circumstances being ascertained, the question of the agreement seems rather to be one of law, and is really neither more nor less than whether a legal obliga-

tion to give time was created by the circumstances. And in this point of view, I apprehend, it was, that in *Pring v. Clarkson* the question was put to the learned judge who tried the cause as a question of law, and that in most cases antecedent and some subsequent, the judge at nisi prius has himself decided it.

In *Gould v. Robson* (a) the question being, whether there was an agreement to give time, and the evidence being only circumstantial, Lord *Ellenborough*, C. J. at nisi prius, himself decided it: and having altered his opinion when the case came before him in banc, the verdict was set aside, and not a new trial granted, as, I conceive, would have been the case, if the Court had viewed it as a question for the jury, but a nonsuit entered. In that case the defendants were indorsers. When the bill became due, the plaintiffs, having applied to the acceptor for payment, agreed to receive from him about half the amount, and to draw a bill on him at a short date for the remainder, but in the mean time they were to keep the original bill in their hands as a security. Lord *Ellenborough*, C. J. at the trial, thought the plaintiffs entitled to recover; but afterwards upon motion, he said, "I had some doubts at the trial, but am inclined to think now that time was given. The holder has the dominion of the bill at the time: he may make what arrangements he pleases with the acceptor; but he does that at his peril; and if he thereby alter the situation of any other person on the bill, to the prejudice of that person, he cannot afterwards proceed against him. As to the taking part payment, no person can object to it, because it is in aid of all the others who are liable upon the bill; but here the holder did something more: he took a new bill from the acceptor, and was to keep the original bill till the other was paid. This is an agreement that in the mean time the original bill should not be enforced; such is at least the effect of the agreement: and, therefore, I think that time was given."

(a) 8 East's R. 575.

212. The case of *Goring v. Edmonds* (a) may here be mentioned.

The plaintiff, by an agreement dated the 20th of April, 1825, sold a quantity of timber to the son of the defendant. One of the conditions of the contract was, that any securities given by the purchaser should be taken up and discharged, half at Michaelmas, and the other half at Christmas, 1825, at furthest. The defendant, in his guarantie, engaged "to fulfil the said payments." The defendant's son soon afterwards removed the timber without any security being required from him, and he was not called upon for payment until the 19th of December, 1825, when he gave the plaintiff two bills of exchange for 200*l.* each, drawn by himself upon a third person, which became due on the 14th and 28th of March, 1826, respectively, and were duly honoured. A balance of 424*l.* then remained, for which the plaintiff made repeated applications, and on the 1st of October, 1827, the defendant's son sent him a bill at two months for 200*l.* drawn by himself on one Williams: this bill was dishonoured, but notice of the dishonour was not given to the defendant's son, the drawer. Shortly afterwards, viz. on the 4th of December, the defendant's son became bankrupt, and on the 27th of the same month the plaintiff, by his attorney, for the first time, applied to the defendant, under his guarantie, for the payment of 424*l.*, the sum remaining due from his son, the principal. At this application the defendant expressed his surprise; but, upon the attorney producing the guarantie, he admitted he was liable. Upon this evidence it was left to the jury to say, whether the plaintiff had given time to the defendant's son without the defendant's consent; and the jury was told that it was a material fact that the defendant had admitted his liability on the guarantie at the time it was shown to him by the plaintiff's attorney. The jury found a verdict for the plaintiff for the full sum of 424*l.* Upon a motion for a rule for a new trial, upon the

(a) 3 M. & P. 259; S. C. 6 B. 94.

grounds, 1. that the creditor had been guilty of laches; and, 2. that he had given time to the principal by taking the bill drawn on Williams; *Tindal*, C. J. as to the latter point, said, "It has been said that the mere giving of time by the plaintiff to the defendant's son, as the principal, would have the effect of discharging the defendant as his surety; and that the plaintiff having taken the bill on Williams, and retained it without giving notice of its dishonour to the drawer, he had made it his own, and discharged the defendant as surety. But in *English v. Darley* it was held, that merely giving time would not discharge the surety; for Lord *Eldon* said, as long as the holder of a bill is passive, all his remedies remain; and if any of the parties be discharged by the act of law, as by an insolvent debtors' act, that operation of law shall not prejudice the holder: and here the plaintiff never took any steps to enforce the payment of the bill. The question I left to the jury was, whether, under the circumstances, time had been given to the defendant's son without the consent (a) of the defendant. He admitted his liability to the plaintiff's attorney when the agreement (of guarantie) was shewn to him, and I thought there was no valid defence to the action, and that the mere circumstance of the plaintiff's not having made any communication to the defendant as to the state of the account between him and his son, would not operate to discharge the defendant as his surety."

213. And for an agreement to give time to have the effect of discharging a drawer or an indorser, it must be an agreement in the legal sense, that is, an agreement for which there is a consideration, or which suspends the liability of the acceptor.

(a) Seemingly, the learned judge inferred a previous consent to time being given, from the circumstance of the defendant having subsequently admitted his liability. But

it also appears that, had there been no evidence of a consent, he was of opinion there was not such a giving of time as would have discharged the defendant.

In *Philpot v. Briant* (a), an action by an indorsee against the drawer of a bill, it appeared that shortly before the bill became due the acceptor died; and the bill being dishonoured, the plaintiff had several interviews with the person who acted for the executrix, in which he stated that the acceptor had left property more than sufficient to pay all his debts. It appeared also, that about twelve months after the bill became due, the plaintiff wrote to the executrix, requesting to know when he might expect payment, and the answer was, that there was not then sufficient personal property to pay the bill, but that if he would let the matter stand over, the executrix would engage to pay it out of her own private income: to which the plaintiff replied, that provided the interest was regularly paid, he would give a reasonable time. The interest had since been regularly paid out of the private income of the executrix, according to that agreement. Upon this evidence it was objected, that as the plaintiff had consented to give time to the executrix of the acceptor, the defendant, as drawer, was discharged. A verdict was given for the plaintiff, with leave to move to enter a nonsuit, but the Court thought the plaintiff entitled to recover, on the ground that the alleged agreement to give time was not a binding contract on either of the parties, and therefore did not suspend the plaintiff's right to proceed at any time against the representative of the acceptor, and consequently that it did not discharge the drawer. *Best*, C.J. upon this point, after adverting to the general principle, by which an agreement to give the principal time discharges the surety, said, "The acceptor of a bill of exchange is considered as the principal debtor. All the other parties to the bill are sureties that the acceptor shall pay the bill, if duly presented to him on the day it becomes due; and, if he do not then take it up, that they, on receiving notice of its non-payment, will pay it to the holder. If the holder gives the acceptor further time for

(a) 1 M. & P. 754.

payment, without the consent of the drawer or indorsers, he discharges them from all the liability that they contracted by becoming parties to the bill. But delay in suing the acceptor will not discharge the drawer or indorsers, because such delay does not prevent them from doing that which, on receiving notice of non-payment by the acceptor, they ought to do, viz. paying the bill by themselves. The time of payment must be given by a contract that is binding on the holder of the bill. A contract without consideration is not binding on him. The delay in suing is, under such a contract, gratuitous. Notwithstanding such contract he may proceed against the acceptor when he pleases, or receive the amount of the bill from the drawer or indorsers. As the drawer and indorsers are not prevented from taking up the bill by such delay, their liability is not discharged by it. To hold them discharged under such circumstances would be to absolve them from their engagements without any reason for so doing. In the case of *The Arundel Bank v. Goble*, which is to be found in a note to Chitty on Bills, and the accuracy of which note is proved by my brother *Burrough's* report to us of what passed at the trial of the cause before him, this point was decided. There the acceptor of a bill applied to the holders for indulgence for some months; they, in reply, wrote to the acceptor, informing him that they would give him the time that he required, but that they should expect interest; and on a motion for a new trial, the Court of King's Bench held, that as no fresh security was taken from the acceptor, the agreement of the plaintiffs to wait was without consideration, and did not discharge the drawer. That is a stronger case than the present. In this case there was no agreement for any particular time, nor any consideration for giving the time that was given to the acceptor. If the promise made by the executrix of the acceptor be considered to be a promise to pay the debt with interest out of the assets of the testator, it gave no claim to the holder beyond what the

bill gave him. The executrix was, before that promise was made, bound to pay principal and interest out of the testator's effects. If it is to be taken to be a personal promise of the executrix, it is void under the statute of frauds, not being in writing. The holder, therefore, had no better security nor any advantage beyond what the bill gave him."

214. If the holder accepts a composition from the acceptor of a bill, or maker of a note, he discharges the indorsers.

Thus, in *Ex parte Smith* (a), where the holder of certain bills and notes, after proving them under a commission against the estate of an indorser, accepted a composition from the makers of the notes and acceptors of the bills, without the consent of the assignees of the indorser, it was held that the indorser's estate was discharged, and the proof made against it was ordered to be expunged. "I go," said the Lord Chancellor, "upon this; the debt is well proved against the indorser's estate; this gives his assignees a right of action against the acceptor, or drawer, for the amount paid out of the indorser's estate; but this right is cut away by the composition and discharge given to the acceptor by the holder. I think, therefore, the debt must be expunged."

215. On the other hand, as the principal is not discharged by the creditor's agreeing to give time to his surety, so in like manner the acceptor is not discharged by the holder's agreeing to give time to the drawer or an indorser. Thus, in *Fentum v. Pocock* (b), the defendant was an accommodation acceptor. It appeared that the plaintiff had received from the drawer a part of the sum named in the bill, and taken a cognovit for the residue to be paid in instalments. The defendant had been asked to consent to the cognovit, but had refused, and now he urged it as a ground of defence; and taking such a cognovit is unquestionably a good defence for a surety. But

(a) 3 Bro. C. C. 1.

(b) 5 Taunt. 192.

the judge at *Nisi Prius*, and the Court of Common Pleas afterwards, thought the circumstance of the defendant being an accommodation party did not constitute him a surety, and judgment was given for the plaintiff.

Mansfield, C. J. said—"No doubt if the defendant can succeed in establishing the principle, that we must so subvert and pervert the situation of the parties as to make the acceptor merely a surety, and the drawer the principal, the consequence contended for must follow. The case of *Laxton v. Peat* (a) certainly is the first in which it was ever supposed that the acceptor of a bill of exchange was not the first person, and the last person, compellable to pay the bill to the holder of it, and that any thing could discharge the acceptor, except payment or a release; and I never before knew that there was any difference between an acceptance given for accommodation and an acceptance for value. When I first saw that case in *Campbell*, I was in the same state as Mr. Justice *Gibbs*, and doubted a great deal whether it could be law. The case of *Collott v. Haigh* must be considered, not as a separate decision, but as resting on the authority of the former. It is utterly impossible for any judge, whatever his learning and abilities may be, to decide at once rightly upon every point which comes before him at *Nisi Prius*; and whoever looks through *Campbell's Reports* will be greatly surprised to see, among such an immense number of questions, many of them of the most important kind, which came before that noble and learned judge, not that there are mistakes, but that he is in by far the most of the cases so wonderfully right, beyond the proportion of any other judges. But upon this case we think that we are bound to differ from him, and to hold, that it is impossible for us to consider the acceptor of an accommodation bill in the light of a surety for the payment by the drawer, and that we cannot, therefore, say that he is discharged by the indulgence shown

(a) See also *Ruggett v. Asmore*, 4 Taunt. 730.

to the drawer. Certainly the paying respect to accommodation bills is not what one would wish to do, seeing the mischiefs arising from them. One might find here a very important distinction between this case and the case decided by Lord *Ellenborough*, namely, that here the person taking the bill did not, at the time when he took it, know that it was an accommodation bill; and if he did not then know it, what does it signify what came to his knowledge afterwards, if he took the bill for a valuable consideration? But it is better not to rest this case upon that foundation, for, as it appears to me, if the holder had known in the clearest manner, at the time of his taking the bill, that it was merely an accommodation bill, it would make no manner of difference; for he who accepts a bill, whether for value, or to serve a friend, makes himself in all events liable as acceptor, and nothing can discharge him but payment or release. The rule, therefore, which has been obtained for setting aside the verdict and entering a nonsuit must be discharged."

Heath, J. said—"Although I feel the utmost deference for the decisions of the noble and learned lord, I cannot concur with him in these two decisions in *Campbell*. Whoever draws an accommodation bill, procures another to accept it, and negotiates it without letting the person to whom he passes it know it is an accommodation bill, is, as I think, guilty of a gross fraud. Shall the holder then be put in a worse situation by reason of the fraud which the drawer has practised on him? The Courts have gone much too far in lending support to these mischievous instruments, the evils resulting from which we see every day. He who comes under the character of acceptor makes himself liable as such in all circumstances; nothing can discharge him but payment or release. The rule must, therefore, be discharged."

216. So, too, the maker of a promissory note is not discharged by the holder's agreeing to give time to any of

the indorsers. Thus, in *Carstairs v. Rolleston* (a), which was an action by the assignees of Kensington & Co. upon a promissory note of which Kensington and Co. were indorsees and the defendants the makers, the defendants pleaded that they made the note as sureties for one C. Rolleston, and not on their own account; and that Kensington & Co. had since released C. Rolleston from all their claims against him; C. Rolleston was an indorser: and the Court held the release to him no ground of defence in the case, the defendant being the maker; in other words, the release of a surety does not discharge the principal debtor.

Per Gibbs, C. J.—"The defendant's object in making this note was to accommodate the payee. We agree that C. Rolleston (the payee), so receiving the note without consideration, could not sue the defendants on it; nor could his indorsee, receiving it from him without consideration. It is argued that the release given by the bankrupts to C. Rolleston, who had indorsed the note to them, operates the extinguishment of that consideration which existed when the transaction took place, and puts the plaintiffs in the state of indorsees without consideration: we do not think that is the effect of the transaction. The note was at first given to the bankrupts upon a valuable consideration; when they have got from C. Rolleston all that they could get from him, they release him, not only from the note, but from the debt; but we think the bankrupts did not thereby relinquish their claim against the maker of the note. We give no opinion what would be the case upon a note where the holders originally had notice that it was given without consideration; but upon the present case, we think there is no ground to say that

(a) 5 Taunt. 551. See also *Dingwall v. Dunster*, Doug. 247; and *Hayling v. Malhall*, 2 W. Bl. 1235. The mistake in the marginal abstract of this case, pointed out by

Lord Eldon, C. J. in *English v. Darley*, is corrected in the valuable edition of the learned commentator's reports by Mr. Elsley.

the release to Rolleston (the indorser) was a discharge to the defendants (the makers)."

216. It is to be observed that the learned Chief Justice, in the last case, said, the Court reserved their opinion,—"We give no opinion") as to "what would be the case upon a note where the holders originally had notice that it was given without consideration." But, if mere notice to the taker of a bill, unaccompanied by any agreement on his part to regard the parties in any other light than that in which they stand upon the bill, is to give an accommodation acceptor the right of a surety, the decision of *Larton v. Peat* will, it seems, be fully re-established, and the principle of *Fentum v. Pocock* overruled; for in the latter case, *Mansfield, C. J.* said—"It appears to me, if the holder had known in the clearest manner, at the time of his taking the bill, that it was merely an accommodation bill, it would make no manner of difference, for he who accepts a bill, whether for value, or to serve a friend, makes himself in all events liable, as acceptor, and nothing can discharge him but payment or release."

But if the taker of a bill not merely has notice that the acceptor is an accommodation party, but the acceptance is given in pursuance of an agreement with the acceptor and drawer that the acceptor shall be the surety of the latter, a question might, as it seems to me, fairly be raised, whether the acceptor, in this case, would not, at least in equity, be entitled to the relief of a surety; for, although by the form of his engagement he appears a principal, according to the real transaction he is a surety; and his claim of relief would be strictly analogous to cases occurring every day; in which a joint debtor by bond (a), or recognizance, goes into equity to prove himself a surety, and obtain the relief of a surety.

A distinction drawn by *Pardessus*, in the passage be-

(a) "A joint bond, without a joint interest, is the case of principal and surety in equity."

low (a), between the bill of exchange (*lettre de change*) and the contract (*contrat de change*), of which the bill is the exterior sign or redaction, illustrates the position of the acceptor under the circumstances just supposed, and affords a confirmation of his right to obtain relief, at least in equity. If one person agrees with the creditor of another to be his surety, and this agreement is completed by the debtor's drawing on the intended surety and indorsing the bill to the creditor, the bill is not a true sign, for the contract, as far as the acceptor is concerned, is not a contract of exchange, but a contract of surety; and according to the real relation of the parties, the debtor, instead of drawing, ought to have accepted, and the surety to have been the drawer.

217. The judgment (b) of the Court of Common Pleas in *Fentum v. Pocock* effectually overruled the *Nisi Prius* decisions of Lord *Ellenborough* in the cases alluded to in it, and they have never since been followed. The principle of those decisions was, that if a bill was accepted, or note made, for no consideration, but merely for the accommodation of some subsequent party, the acceptor or maker was to be considered as a surety. Thus in *Laxton*

(a) "On voit par ces definitions qu'il ne faut pas confondre les lettres de change et leurs endossements avec le *contrat de change*. Ce contrat est la convention par laquelle une personne s'oblige à faire payer dans un ville désigné une somme déterminée, pour la valeur qu'elle reçoit on doit recevoir dans un autre lieu que celui ou la somme promise sera payée. La lettre de change et l'endossement appartiennent à l'exécution du contrat de change; ils le supposent; ils en sont la consequence,

mais ils ne sont pas le contrat lui-même. Le plus souvent, il est vrai, la convention de change n'existe, ou n'est stipulée qu'implicitement: le fait seul de la délivrance ou de l'endossement de la lettre en est le signe, et constate la stipulation qui a dû la précéder, ou au moins l'accompagner tacitement, parceque tout effet suppose une cause, quoique non exprimée." — *Traité du Contrat et des Lettres de Change*, par M. Pardessus, tome ii, part 1, chap. 1, s. 15.

(b) *Ante*, p. 193.

v. Peat (a), the plaintiff, the indorsee of a bill, knowing the bill was accepted for the accommodation of the drawer, gave the drawer time, and Lord *Ellenborough, C.J.* said, "This being an accommodation bill within the knowledge of all the parties, the acceptor can only be considered as a surety for the drawer, and in the case of simple contracts, the surety is discharged by time being given, without his concurrence, to the principal. The defendant's remedy over is materially affected by the new agreement into which the plaintiff entered with the drawer after the bill was due. The case is exactly the same as if the bill had been drawn by the defendant, and accepted by Hunt (the drawer) in consideration of a debt due. According to many authorities, the defendant upon that supposition would have been discharged by the time given to Hunt; and the principle of these authorities applies with equal strength to the facts actually given in evidence." And in like manner, in *Collott v. Haigh (b)*, where the bill was accepted for the accommodation of the defendant the drawer, and the plaintiff had given the acceptor time, the same learned judge said, "The drawer of an accommodation bill must be considered as the principal debtor, and the acceptor only in the light of a surety. The reason why notice of the dishonour of a bill must in general be given to the drawer is, that he may recoup himself by withdrawing his effects from the hands of the acceptor; and he is discharged by time being given to the acceptor without his consent, because his remedy over against the acceptor may thus be materially affected. But where the bill is accepted merely for the accommodation of the drawer, he has no effects to withdraw, and no remedy to pursue when compelled to pay. He therefore suffers no injury either by want of notice, or by time

(a) 2 Camp. N. P. C. 185. Lord *Tenterden*, in *Yallop v. Ebers*, 1 Barn. & Adol. 703, says, "*Laston v. Peat*, where it was held that an

accommodation acceptor might be considered as a surety, has been long overruled."

(b) 3 Camp. N. P. C. 281.

being given to the acceptor, and in an action upon the bill he cannot defend himself upon either of these grounds" (a).

218. In *Ex parte Glendinning* (b), the Lord Chancellor (*Eldon*) refused to adopt the principle of the decision of *Fentum v. Pocock*, and affirmed a decision of the V. C. at variance with it. Glendinning, the petitioner, cashed for Rowe a bill of 350*l.* drawn by Rowe on Renton, the bankrupt, whom the petitioner knew to be an accommodation acceptor. The bill was dishonoured; the petitioner arrested Rowe, and afterwards came in under an assignment of his effects for the benefit of his creditors. In consequence of this arrangement with Rowe, the V. C. ordered the proof against Renton's, the acceptor's, estate to be expunged, and the petition of appeal from this decision was dismissed with costs: and, on that occasion, the Lord Chancellor delivered remarks containing, as it seems to me, errors, the indication of which is of some importance in relation to my subject:—"I perfectly remember when it was for the first time (c) laid down in the courts of law, that where there was an acceptor without effects, notice of the dishonour of the bill need not be given to the drawer. This rule being once established, there naturally sprung out of it a new doctrine as to the respective liabilities of the drawer and acceptor in cases where the indorsee had notice that the acceptance was given merely for the purpose of accommodating the drawer. And the

(a) In *Perfect v. Musgrave*, 6 Price, 111, the defendant was one of two joint makers of a promissory note, upon which a verdict was obtained against him; and it was moved to set aside the verdict, partly on the ground that the plaintiffs had accepted a composition from the other joint maker; but the Court rejected the motion. As the indexes refer to this case, it seems necessary to notice it; but

from the omission of the terms of the composition deed, the decision is of no practical value.

(b) 1 Buck, 517.

(c) It was shortly after *Buller, J.* was called to the bench. See *Bickerdike v. Bollman*, 1 Term R. 408. The novelty of the decision affords no presumption of its incorrectness, as the epoch of mercantile law dates from Lord Mansfield.

cases go the full length of determining that as between the drawer and acceptor and indorsee with notice, the drawer should be considered as the principal; and if the indorsee give time to the drawer, that shall discharge the acceptor. These cases were shaken by the authority of Sir *James Mansfield*, which in this and in every other Court is entitled to be received with the greatest respect. But I observe, in the printed report of the case, that not one of the numerous decisions of this Court were called to that judge's attention. Now the practice is quite familiar in this Court, where the indorsee, with notice of the accommodation transaction, has recovered upon the acceptance, to allow the acceptor to prove for the amount under the drawer's commission. I think this equity naturally grew out of the doctrine of not requiring notice to be given when the acceptor had no effects." Now, if the principle is considered, according to which a drawer who has no effects in the hands of the acceptor is not entitled to notice, the rule referred to leads, as it seems to me, to none of the consequences which are here said naturally to spring from it. The principle is one of disfavour towards the drawers of accommodation bills, and of favour towards holders, and it disentitles the drawers to notice, or rather exempts the holders from the penal consequences attached, in general, to the neglect to give drawers notice, because the relation of such drawers to the acceptors is different from that which the theory of a bill, out of which the right to notice grows, supposes to exist between drawers and acceptors. The theory of a bill, or general principle upon which the obligation to give notice to the drawer is founded, supposes the bill to be drawn for value; and if it is not drawn for value, the obligation consequent upon the supposition does not arise, there being, in this case, no cause for it: without the cause the effect cannot follow. And in this point of view the cases respecting notice are in no degree shaken by the case of *Fentum v. Pocock*; and, in point of fact, those

cases continue to be considered as valid. And I must add, that I have passed over all those cases, because, viewed in a true light, as it seems to me, they have no relation to the principles of the law of surety, and it is erroneous to suppose them to rest on the assumption that the drawer of a bill is a principal as towards the holder, and the acceptor a surety, if he had not effects, or a consideration, to meet the bill, springing from the drawer (a).

Nor, as it seems to me, does that judgment bear the most distant relation to the practice of allowing accommodation acceptors, after payment, to prove against the estate of the drawer; for it is clear, that payment for the drawer's benefit, where there has been no consideration for the acceptance, would entitle the acceptor to be reimbursed by the drawer, without supposing him to have been a surety for the drawer; for the law would imply, that, in drawing an accommodation bill, the drawer contracted either to provide the acceptor with effects, or to pay him. And, indeed, the right of the accommodation acceptor to prove against the drawer remains, although the case of *Fentum v. Pocock* is, as has been just observed, recognized in all the Courts both of law and equity.

The Lord Chancellor proceeds:—"Although no man more than myself laments the introduction of that doctrine, yet I cannot overturn what has been for so many years acknowledged and acted upon as part of the general mercantile law of the country." Having, therefore, determined to view Rowe, the drawer, as the principal, and Renton, the acceptor, as his surety, the learned Lord affirmed the decision of the V. C., by which the proof of the holder against the estate of the acceptor was ordered to be expunged. But it seems from the next passage he thought, that if, upon the arrangement made between

(a) It should never be lost sight of, that the rule respecting notice is, in its spirit, penal to the drawers, and to the holders exonerative, and that the decision of *Fentum v. Pa-*

cock is in the same spirit; but the rule adopted in *Laxton v. Peat*, on the contrary, is penal to holders, and favourable to accommodation acceptors.

the holder and the drawer, there had been a reservation of the right to resort to the acceptor, he would still have continued liable, although a surety :—" If a man by deed agree to give his principal debtor time, and in the deed expressly stipulates for the reservation of all his remedies against other persons, they shall still remain liable, notwithstanding the arrangement between their principal and the creditor; but if the creditor do not reserve his remedies, the deed will operate as a discharge to the sureties; which rule, I conceive, is founded upon this maxim, that it is against conscience and equity that you should put persons in a situation in which they have not contracted to be placed. It may be said, the surety is not injured by the creditor's arrangement with the debtor, and in many cases the compromise may happen to be extremely advantageous to him: but this is no answer to a surety who stands upon his contract. Besides it is evident, creditors would not pursue their actions with the same pressure and activity, if they were not urged on by the consideration that any laches on their part would discharge the sureties. Ever since Mr. Richard Burke's case the law has been clearly settled, and it is now perfectly understood, that unless the creditor reserve his remedies he discharges the surety by compounding with the principal, and the reservation must be upon the face of the instrument by which the parties make the compromise, for evidence cannot be admitted to explain or vary the effect of the instrument. I, therefore, (that is, because the alleged reservation was not upon the face of the instrument,) feel myself bound to declare, in conformity to the decisions of my predecessors, that the trust deed operated as a discharge to the acceptor."

In this passage the learned Lord evidently makes no distinction between sureties by the proper contract of guarantie and accommodation acceptors, and regards as valid a reservation of the liability of any kind of surety. But to a reservation of the liability of a surety by the proper contract of guarantie, or of one who is considered

as a surety in equity, I must oppose, first, the consideration of its absurdity; and, secondly, some modern cases in which reservations of this kind have been regarded as nullities. First, to dispense with the performance of an obligation by him who is to perform it in the first instance, and to insist upon its performance by him who is only secondarily liable, is a manifest inconsistency with the essence of the secondary obligation; either, therefore, the agreement to dispense with its performance by the principal, or the reservation of the right to insist upon its performance by the surety, must eventually be treated as a nullity, and, of the two, it seems more reasonable to regard the reservation as a nullity, because it was not consented to by the surety. 2. An agreement which has the effect of disentitling the creditor to insist on the performance of the terms of the original contract, is, in effect, a discharge of the obligation created by the contract; and if the creditor discharges his principal, the surety is ipso facto discharged, in virtue of the essential principles of his contract: upon what principle, then, the reservation can be allowed to operate, let those say who think it valid. 3. It is of the essence of the obligation of surety, that the surety is obliged for the same thing as the principal debtor; an agreement, therefore, raising an obligation between the two principal parties different from that to which the surety acceded, and in lieu of it, is inconsistent with the obligation of surety; the agreement, therefore, being allowed to be valid as between the parties to it, the obligation of surety becomes, in effect, annihilated: how, then, can the reservation operate? 4. Were a reservation of the surety's liability consistent with the principles of the obligation of surety, I can see no reason why it should in any case be regarded as absurd: and I cannot help thinking, that it was from an indistinct perception of the principles just adverted to, that Lord *Eldon*, in *Boulbee v. Stubbs* (a), said, of a reservation, that a stipu-

(d) *Anti*, p. 182, n. (a).

lation of that kind is in many cases so very absurd, it must be seen plainly.

Secondly, in *Bowmaker v. Moore* (a), a case of replevin-sureties, there was a stipulation that the agreement between the two principals should not discharge the sureties. But the Court said, when the agreement was executed, (that is, made,) the bond, as against the surety, was functus officio: and that, after the agreement, the landlord could not be suffered to have his original remedy against the surety.

In *Archer v. Hale* (b), another case of replevin-sureties, of recent date (1828), the sureties were held to be discharged, notwithstanding a stipulation intended to remove their liability.

219. The difference between a reservation intended to continue the liability of a mere surety, and which is null, and a reservation of securities, is so obvious that I scarcely need advert to it. Yet it seems not always to have been perceived, perhaps owing to the vague import of the word securities. A guarantie is a security; a reservation of securities being, as to some securities, valid, this expression has been used as an authority for a reservation against mere sureties; but the reservation which is valid must be understood to be exclusive of such a security, for this plain reason, that the reservation is inconsistent with the nature of a guarantie, though not of other securities. Thus, the bill of a third party, deposited with the creditor, may be reserved, if the reservation is intended, because the party to the bill is not, with relation to the pledgee, a surety: the bill with relation to the pledgee is clothed with the whole debt, and the creditor may say, I am satisfied with the bill and discharge my debtor from personal liability, and the party to the bill could not, as the surety in such a case might say, the discharge is inconsistent with my contract, for the contract supposed by the bill is not a contract of surety: and, therefore, without any reservation of such securities, the creditor may retain them for his own

(a) *Antè*, p. 123, *et seq.* (b) *Antè*, p. 124. See also *West v. Ashdown*, *post*.

benefit, unless the retention of them appears to be inconsistent with the meaning of the agreement. Thus in *Thomas v. Courtney* (a), it appeared that the plaintiffs and other creditors of Messrs. Baker and Son had agreed to accept, in full satisfaction of their demands, 12*s.* in the pound, to be paid by the promissory notes of Baker and Son at six, twelve, fifteen and eighteen months. The plaintiffs held at the time a bill drawn by Baker and Son, and accepted by Colonel Gower, and also (b) a common guarantie by the defendant, and the Court held that the plaintiffs might use their securities: as to the common guarantie. however, this decision is maintainable, I conceive, only on the grounds contained in the following remarks of *Holroyd, J.*

“ In the first place it may be remarked, that the instrument (of composition) is not in terms an actual release; for it is not immediate, but prospective only, the language being that the creditors *shall* and *will* release Baker and Son. Would it then operate as a release? *This agreement is not under seal*; how then could it operate as a release? There being then no express stipulation for giving up securities, and nothing whence such a stipulation could be implied, *and the effect of the agreement not being to extinguish the debt*, I think the creditors were entitled to hold their securities, and consequently that the plaintiffs are entitled to hold the eight shillings beyond the twelve shillings upon the amount of the security.”

(a) 1 B. & Ald. 1.

(b) The case is stated to be an action upon a guarantie; the argument, however, does not allude to the guarantie, but relates solely to a bill of Colonel Gower's. I infer that the case, by accident, was argued with reference to the bill, it being supposed, that if the plaintiff was entitled to reserve the bill he was entitled to reserve the guarantie; and so the decision respecting the bill was considered conclusive

with respect not only to that but to the other “security,” the guarantie of the defendant. And according to this hypothesis, (the only one which seems to me to account for the silence of the Court as to the defendant's guarantie, and that of the reporters as to the bill, except as it is alluded to by the Court and counsel,) the case is a striking illustration of the fallacy already pointed out, as incident to the term “security.”

CHAPTER VII.

OF THE PRINCIPLES WHICH REGULATE THE LIABILITIES AND
DISCHARGE OF BAIL.

220. The principles of the contract of bail are the same as those of the common contract of surety, for bail are sureties (a).

Bail are of two kinds, sheriff's bail or bail below, and bail to the Court or action, or bail above. I shall confine my remarks almost wholly to the latter; for if the application of the principles of the law of surety to this class is understood, a perception of their application to the other follows.

The obligation of bail (above) is at first in the alternative, that they shall either render the defendant, when called upon to do so (b), or pay what may be recovered against him. Correlative to the obligation of the bail to render, is their right to keep the defendant. This right they possess in virtue of their office, for

"Bail signifies guardian or keeper."

"A man bailed is, where any one arrested, or in prison, is delivered to others, as his bail, who ought to keep him to be ready to appear at a time assigned, or otherwise to answer for him."

"And therefore the bail may keep the person committed to them in their custody, for their indemnity."

(a) "Surety, is a general word which comprehends all the former," viz. Bail, Mainprize, Pledge, and Caution. See Com. Dig. tit. Bail (E).

(b) "The language of the condition of the recognizances is, if the principal shall not pay the damages or render himself." The words,

"or render himself," have been construed to import that the principal is to render in discharge of his bail only when the plaintiff has by suing out a ca. sa., intimated an intention to take the body of the defendant." *Per Bayley, J. in Sandon v. Proctor*, 7 Barn. & Cres.

“Or, if he be at large, they may reseize him, and bring him before a justice to find new bail, or to be committed to prison” (a).

221. The office of bail, thus defined, it is evident, is founded in the privilege given by the law to the plaintiff, of arresting and imprisoning, and keeping imprisoned, the defendant. And therefore if the plaintiff, in any case, either had not the right to arrest, or by his own act, or the act of the law, has lost the right to keep, the defendant, the derivative right of the bail ceases; and their right of keeping the defendant being gone, they are discharged from the obligation of rendering him.

Therefore, if a defendant becomes bankrupt and obtains his certificate before the bail are fixed, that is, whilst their obligation is in the alternative, and before it is become simply a pecuniary one, they are discharged, because the certificate releases the defendant from personal liability to the plaintiff, and consequently puts an end to the right which the bail had of keeping or rendering the defendant. In *Munmin v. Partridge* (b), the leading case upon this subject, Lord *Ellenborough*, C. J. delivered the following judgment:—“This was an application to set aside the judgment and execution against the bail upon payment of costs, and for returning to the bail the money levied; and the ground of the motion was, that after the return of the *capias ad satisfaciendum* against the principal, and before the first *scire facias* against the bail was delivered to the sheriff, the principal obtained his certificate, which discharged him from the debt; and the question was, whether the principal’s certificate at that period, after the *capias ad satisfaciendum* was returnable, but before the time allowed the bail by the indulgence of the Court for rendering the principal had expired, entitled the

(a) See Comyn’s Digest, tit. *Johnson v. Lindsay*, 2 D. & R. 385; Bail, (A.) S. C. 1 B. & C. 247; *Harmer v.*

(b) 14 East’s R. 598. See also *Hagger*, 1 B. & Ald. 332; *Thack- Woolley v. Cobbe*, 1 Burr. 245; *ray v. Turner*, 1 J. B. Moore, 457.

bail to be relieved. And we are of opinion that it did. In *Woolley v. Cobbe*, 1 Burr. 245, this distinction was made, that if the certificate were obtained before the bail were fixed, they were entitled to be discharged; but if they were fixed before the certificate obtained, they remain liable. And accordingly, in that case, where the certificate was not obtained until after judgment and execution against the bail, the Court refused to relieve them. Bail are to some purposes said to be fixed by the return of non est inventus upon the capias ad satisfaciendum; but if they have by the indulgence of the Court time to render the principal until the appearance-day of the last scire facias against them, and which they have the capacity of using, they cannot be considered as completely and definitively fixed till that period. As, therefore, the principal obtained his certificate before the time for rendering was out, and therefore before they were fully and finally fixed; as the principal would have been entitled to an immediate and unconditional discharge had he been rendered; and as the bail would have been entitled to have had an exoneretur entered on the bail-piece, had they applied for it; we are of opinion that they are entitled to the indulgence they now ask upon the terms on which they ask it, namely, on payment of costs, and therefore that the rule should be absolute."

222. But a certificate derives its efficacy only from the allowance by the Lord Chancellor, and therefore, if the bail are fixed before it is allowed, they are not entitled to an exoneration, although it has been signed by the creditors. Thus in *Stapleton v. Macbar* (a), where the bail were fixed between the signature of the certificate of their principal by his creditors, and the allowance of it by the Lord Chancellor, the Court of Common Pleas refused to relieve the bail. *Gibbs*, C. J. after stating the question to be, whether the bail who by the letter of their contract were liable should be discharged, said, "In the case of

(a) 7 Taunt. 589.

Walker v. Gibbett (a), the action was brought in 1765; the certificate signed in 1766; the debt proved in 1767; the certificate allowed in July, 1768, and the judgment on the scire facias against the bail was dated the 4th of June, 1768. The bail brought error, and it was held that the allowance of the certificate has no relation back, and that until it was allowed by the Chancellor it was nothing. It is a matter of indulgence whether the bail shall be relieved or not; and the only ground on which the Court relieved the bail is, that at the time when you proceed against the bail, the principal is discharged; but here, at the time that the plaintiff obtained judgment against the bail, nothing hindered the plaintiff from pursuing the principal The question here is of relieving the bail. The rule is, that bail, fixed by a regular judgment, shall not be relieved, unless the bankrupt was, at the time when they were fixed, in such a situation that he could not be sued. Their relief, up to the time when the scire facias is returnable, is matter of right; then relief for eight days afterwards is matter of indulgence; but there is no instance where relief has been given on the ground that before the bail were fixed the bankrupt had conformed. As no such case has been found, I am clear the bail are not entitled to relief."

223. If a defendant succeeds to a peerage (b), or becomes a member of the House of Commons (c), or receives sentence of transportation for felony (d), or is sent out of the kingdom under the alien act (e), or dies before the

(a) 2 Wm. Bl. 811. See also *Hodgson v. Temple*, 5 Taunt. 503.

(b) *Trinder v. Shirley*, 1 Doug. 45.

(c) *Langridge v. Flood*, cited in *Grant v. Fagan*, 4 East's R. 189, et 1 Tidd's Pract. 293.

(d) *Wood v. Mitchell*, 6 Term R. 247; *Sharp v. Sheriff*, 7 Term

R. 226; *Daniel v. Thomson*, 15 East's R. 76.

(e) *Merrick v. Vaucher*, 6 Term R. 50. See also *Postell v. Williams*, 7 Term R. 517, where, for the same cause, the Court ordered the bail bond given to the sheriff to be delivered up to be cancelled.

bail are fixed (a), the bail are discharged, because the effect of each of those events is, to deprive the plaintiff of his authority or power over the person of the defendant, and the bail of their right or power to render the defendant. Thus, in the case in which bail applied for an exoneration on the ground that their principal had been sent out of the kingdom under the alien act, Lord *Kenyon* said, "The bail only engaged for the principal in the then situation of the parties: but it is now become impossible for them to render the principal, and this impossibility does not arise from any act which they could controul, but from the operation of an act of parliament. These bail, therefore, to whom no fault or neglect whatever is imputable, ought not to suffer in consequence of an act which was passed for the benefit of the public."

In like manner, if the plaintiff proves under a commission of bankrupt against the defendant before the bail are fixed, they are discharged, because proving under the commission is an election to resort to the defendant's estate, in lieu of proceeding against him personally; after which, the plaintiff could not take him on a ca. sa., or call on the bail to exercise their derivative right of rendering him. The Court, in the case alluded to (b), "were clear that the effect of the statute" (49 Geo. 3, c. 121, s. 14, with which 6 Geo. 4, c. 16, s. 59 (c), corresponds) "was, that after the plaintiff had proved under the commission, he

(a) *Chandler v. Roberts*, 1 Doug. 58.

(b) *Linging v. Comyn*, 2 Taunt. 246.

(c) This section concludes with the following proviso:—"Provided also, that any creditor who shall have so elected to prove or claim, if the commission be afterwards superseded, may proceed in the action as if he had not so elected, and in bailable actions shall be at liberty to arrest the defendant de novo, if he has not put in bail be-

low or perfected his bail above, or if the defendant has put in or perfected such bail, to have recourse against such bail, by requiring the bail below to put in and perfect bail above within the first eight days in term after notice in the London Gazette of the superseding such commission, and by suing the bail upon their recognizance, if the condition thereof is broken." There is much confusion of idea in this proviso.

could not take the defendant in execution; and the bail were only liable in case the plaintiff, being entitled by his judgment to take the defendant on a *capias ad satisfaciendum*, should be unable to do so."

224. But if it is not until after the bail are fixed, that the defendant obtains his certificate (*a*), or dies (*b*), the bail are not discharged; and this, the converse of two of the above cases, equally proves the agency of the general principle stated; for the bail when fixed have no longer the right of rendering the defendant, and, therefore, when they are fixed, an event, which merely exempts their principal from a liability to be rendered, does not affect them. So bail in error are not discharged by the certificate of the defendant (*c*), because their obligation is not in the alternative; but is simply pecuniary, and they have at no time the custody of the defendant, nor, consequently, the right of rendering him. Mr. Justice *Ashurst* said, "The Court will never order an *exoneretur* to be entered but where the bail have a right to surrender the principal. But that is not the case with bail in error, who have not the alternative of surrendering the principal. And though the principal be himself discharged by his bankruptcy, yet the plaintiff may have recourse to the bail (in error)." And *Buller, J.* said, "where there are bail to an action, and the principal becomes a bankrupt before they are fixed, they ought in strictness to surrender the principal, who, being a bankrupt, would be immediately entitled to be discharged. Therefore, the Court, to avoid circuitry, have done that directly, which they (the bail) could only otherwise do indirectly. But that is never done in favour of bail in error, because they cannot surrender the principal at all."

225. If a defendant obtains a writ of error, it suspends the right of the plaintiff to proceed upon the judgment

(*a*) *Woolley v. Cobbe*, 1 Burr.

(*b*) *Rawlinston v. Gunston*, 6

245. See also *Cockerill v. Owston*, Term R. 284.

id. 436.

(*c*) *Southcote v. Braithwaite*, 1

Term R. 624.

obtained below, and, consequently, it suspends his right to proceed against the bail (a). An injunction has the same effect (b); immediately restraining the plaintiff from proceeding against the defendant, it consequently prevents him from proceeding against the bail, they being in general liable only whilst their principal is liable, and any proceeding against them would be a contempt of the injunction granted in favour of their principal.

226. If the plaintiff agrees to give the defendant time, whether before or after judgment, and whether the bail are fixed or not, the bail are discharged, as common sureties are, when time is given by the creditor to their principal. Thus, for instance, a plaintiff, after obtaining judgment, agreed to take bills of the defendant payable at a future day, and accepted by a third person. This gave the defendant an immunity from arrest until it was seen whether the bills were paid, and, therefore, the bail, it was held, were discharged (c).

Per Gibbs, C. J. "Here it appears, that the defendant has procured a surety to accept bills payable at a future day, and those bills being payable at a future day, the defendant has purchased the privilege of being free from arrest, until it be seen whether the bills will be paid or not; he has given, therefore, a consideration for his freedom from arrest for a certain time, and until that is expired, the plaintiff could not take him; and that being so, according to the doctrine of all the cases, the bail are discharged."

227. But merely taking security from the principal debtor, under circumstances which exclude the supposition that the creditor has agreed to forbear in consideration of the further security, or without the intervention of circumstances from which such an agreement may be inferred, will not entitle the bail to an exoneration.

(a) *Perry v. Campbell*, 3 Term R. 390.

(c) *Willison v. Whitaker*, 7 Taunt. 53.

(b) *Chaplin v. Cooper*, 1 V. & B. 19.

Thus, where the plaintiff took bills of exchange from a defendant with an express stipulation that he should not be precluded from proceeding while the bills were running, the bail were held not discharged (a).

Gibbs, C. J. said, "The doctrine was first introduced in courts of equity, that if the creditor gives time to the original debtor the surety is discharged. It was founded on this principle, that every surety has a right to come into a court of equity and require to be permitted to sue in the name of the original creditor. If the creditor gives time to the original debtor, he thereby prevents the surety from using his name with effect. The courts of law have held with respect to bail, that the bail are entitled to surrender the principal at any time, whenever the plaintiff himself would not be precluded from taking or proceeding against him. If the creditor gives time to the principal, the creditor cannot, during that time, take or proceed against him; neither during the same period can the bail, who are, therefore, discharged. In this case bills of exchange are given, and it is agreed, as it is said, that the plaintiff should not proceed against the original defendant, unless it should appear that the bills failed to be duly honoured. On the other hand, it is positively sworn that it not only was not agreed that the plaintiff should not proceed while the bills were running, but that it was expressly agreed that the plaintiff was to be at liberty to proceed during that period. It is said, and is not wholly incredible, that the defendant said, 'proceed against me or not, as you please; I throw myself on your mercy; but to induce you not to proceed, I put these securities into your hands.' The plaintiff expressly swears that he never made any agreement to give time. The plaintiff, therefore, not having ever given time to the defendant, has never precluded himself at any moment from proceeding against the defendant, and having never precluded himself at any moment from so proceeding, the bail were never at any time prevented from surrendering the de-

(a) *Melwill v. Glendinning*, 7 Taunt. 126.

fendant, consequently they would have been warranted in surrendering him at any time of this transaction; and, therefore, they are not thereby discharged from their liability. But as this transaction might well mislead the bail, if unexplained, the rule must be discharged without costs."

228. In like manner, if the plaintiff merely remits his legal diligence, the bail are not entitled to be exonerated. And, therefore, where (a) the plaintiff, after obtaining judgment and issuing a ca. sa. merely offered to accept a composition, saying at the same time, he would not arrest the defendant for three weeks, that he might have the opportunity of consulting his creditors, the Court refused to relieve the bail. *Gibbs*, C. J. said, "The plaintiff, by remitting his legal diligence, does not bar the bail from surrendering their principal at any moment; the plaintiff has never disarmed himself; he has never put himself in such a situation that he might not at all times proceed with his action."

229. A reservation of the instant right to proceed against the bail, accompanying an agreement to give time to the principal, is a nullity. And so is such a reservation, if the creditor, in favour of the principal, in any manner dispenses with the performance of the condition for which the bail are liable. Thus in *West v. Ashdown* (b), the defendant offered to render himself on the 13th of May, but the plaintiff dispensed with the surrender, and gave him time, on the understanding that his bail should continue liable, and the bail ignorant of this, signed an agreement to continue liable; proceedings having afterwards been taken against the bail, it was held that they ceased to be liable when the surrender was dispensed with, and their agreement made in ignorance of the offered surrender could not revive their liability (b).

Per Curiam. "The bail ceased to be liable when the

(a) *Brickwood v. Annis*, 5 Taunt. 614. (b) 7 J. B. M. 568. S. C. 1 B. 164.

defendant's surrender was dispensed with, and they could not become liable afterwards, by the agreement which they entered into, in ignorance of the circumstance that the defendant had offered to surrender, or of the effect of the plaintiffs having allowed him time. This is like the case on which time is given to the principal."

230. If the plaintiff accepts from the defendant a cognovit for the payment of the debt by instalments, the bail are discharged, unless they are parties to the arrangement. "For," said Lord *Mansfield*, C.J. (a) "if the defendant had been surrendered after such a cognovit, the Court would discharge him. The purpose of all these proceedings is, to secure the plaintiff. But the plaintiff has agreed to take the money in a different way, and therefore the bail are discharged." And *per* Mr. Justice *Heath*, "It would be very extraordinary that if the plaintiff parted with the power of taking the defendant until default made in payment of the instalments, the power of taking him should still subsist in the bail; that power is entirely derived from him, and dependent upon the power of the plaintiff to take him." *Per* *Chambre*, J. "If the bail were to surrender the principal, they would be discharged in a circuitous way, for no doubt the Court would hold the principal entitled to his. It does not appear that in the case of *Hodgson v. Nugent* the cognovit was for payment by instalments: without time given, it is not a discharge."

In the argument upon the case last referred to, it had been suggested, that in the King's Bench there were cases opposed to the principles stated in the above judgments, but, upon inquiry, *Heath*, J. reported, "that the judges of the Court of King's Bench declared that the practice there was now settled to be, that the bail were discharged by such a cognovit." And *Gibbs*, J. adverting to this question, said, "I was of counsel in the cause in the Court of King's Bench, in which it lately was ruled, that

(a) *Bowfield v. Tower*, 4 Taunt. 456.

by giving a cognovit payable by instalments, the bail were discharged, by analogy to the cases where a creditor, by giving time to the principal, discharges the surety. The bail cannot render the principal if the plaintiff gives the defendant time for payment by instalments, until the time when failure is made in payment of an instalment. The bail, therefore, are put in a different situation from that in which they placed themselves when they entered into their recognizance."

In *Thomas v. Young* (a) also Mr. Justice Bayley said, "That the plaintiff could not give a partial indulgence to the principal without the consent of the bail; and that if he did he discharged them, for the bail could not after this have rendered the principal."

231. But if the cognovit is payable within the time in which the plaintiff could have obtained judgment and issued execution, had he regularly proceeded through the various stages of the action, the bail are not discharged (b).

Per Lord Tenterden, in Roche v. Stevenson:—"We are clearly of opinion that bail are not discharged by the plaintiffs taking a cognovit from their principal without their consent or knowledge, unless by the terms of the cognovit he is to have a longer time for the payment of the debt and costs than he would have had if the plaintiff had proceeded regularly in the action (c)."

(a) 15 East's R. 616, overruling the antecedent opinions of the Court. See *Shakespeare v. Phillips*, 8 East's R. 433, where Lord Ellenborough said, with reference to a cognovit for payment by instalments, "The debt, quæ debt, was instantly due, both as against the principal and bail, but only with a stay of execution, according to the terms of the cognovit, for certain proportions, till certain times.

Then the undertaking of the bail is either to render the principal or pay the condemnation money, which as against them, when they became fixed, was the one entire sum of 70*l.*, only with the same dies dati given as in the case of the principal."

(b) 9 B. & C. 707. Same decision against the other bail in *Stevenson v. Crease*, 4 M. & R. 561.

(c) This decision, upon its first

232. In *Hulme v. Coles*, the case of a common surety, there is a correspondent decision. That was a motion for

appearance, struck me as being at variance with established principles; (see the *Legal Observer*, vol. i. pp. 190, 219, 282;) and after much discussion and thought upon the subject, I continue of that opinion. It seems to me, that were no other parties interested than the two principals, that is, the two parties to the cognovit, the plaintiff and defendant, the defendant, if in prison, might appeal to the Court, and resting upon the cognovit say, "here is a proceeding by which, until the time arrives when the plaintiff can take his judgment, he has made me a free man;" and claim to be released from prison: and if so, his bail, who are his gaolers, and who are entitled to keep him only so long as, supposing him not to have obtained bail, the plaintiff might have kept him in prison, may come and claim their exoneration; for the authority of the bail, originally derived from the plaintiff's right to arrest the defendant, subsists at each successive moment on the continuance of the plaintiff's right

to imprison, or keep imprisoned, the defendant. If the fair meaning of such a cognovit is, that it makes the defendant a free man, there is no resisting the conclusion that it entitles the bail to an exoneration; for the modern practice is, that the bail shall be considered as exonerated, from the moment at which, supposing them to have made a render, the defendant would be entitled to his liberation (a); and the bail may, at any time after that moment, claim a formal exoneration. In defence of the construction of the cognovit here assumed as the basis of this argument, it may be said, that it is at least as natural as the opposite construction, that is, the construction according to which such a cognovit does not make the defendant a free man; and the consideration of public policy which favours personal freedom makes it preponderant. If there is a doubt, the public policy requires the decision should be in favour of the defendant.

(a) "Formerly the method was for the bail to surrender the defendant, and then for him to apply to be discharged upon an affidavit, stating the fact of his having become bankrupt since the cause of action arose, and obtained a certificate of his conformity to the commission. But of late, where a bankrupt is entitled to his discharge, the Court, to avoid circuitry, have ordered an exoneretur to be entered on the bail-piece without the form of a regular surrender of the bankrupt by

his bail. Here it is clear the bankrupt himself would not have been entitled to his discharge if surrendered, and the bail can never be in a better situation than their principal." *Per Lord Mansfield, C. J. in Martin v. O'Hara*, 2 Cowp. 823. Under the old practice the bail were often in a much worse situation than their principal; for he might be entitled to be at large, and yet they would still be liable unless they could formally surrender him.

an injunction to restrain the defendant, the administrator of Catherine Coles, from proceeding at law against the plaintiff upon a bond given to the intestate by one Buckhardt and the plaintiff Hulme, as his surety. The facts relied upon in support of the motion were, that in June, 1817, Catherine Coles commenced an action on the bond against Buckhardt, and afterwards, in the same month, took a cognovit from him for the debt, with a stipulation that judgment should not be entered up, nor execution issued, until the first of August following. It was insisted that this was a giving time to the principal which discharged the plaintiff, the surety. The Vice-Chancellor (*Hart*) said, "The principle of discharging a surety by the giving of time by the creditor, is a refinement of a Court of Equity, and I will not refine upon it. By the arrangement complained of, time was not given, but the remedy was accelerated (*a*).

233. So too bail are not discharged by the plaintiff's taking a cognovit upon which he may sign judgment instant; because, upon the plaintiff's entering up judgment, the bail might afterwards have rendered the defendant (*b*).

234. If, before bail above are put in, the plaintiff takes from the defendant a cognovit, whether with or without a stay of execution, the bail to the sheriff are discharged; for the acceptance of a cognovit operates as an admission by the plaintiff that the defendant has appeared to the action; and the defendant's appearance is a performance of the condition of the bail bond (*c*).

(*a*) In *Jay v. Warren*, 1 Car. & Payne, N. P. C. 532, an action by the indorsee against the indorser of a bill, *Abbott, C. J.* ruled that the defendant was not discharged by the plaintiff's having taken from the acceptor a cognovit giving three weeks' time, which was a period short of that in which judgment

could have been obtained against him. See also *Lee v. Levi*, 1 Car. & Payne, N. P. C. 553.

(*b*) *Per Heath, J.* in *The King v. The Sheriff of Surrey*, 1 Taunt. 161.

(*c*) *Farmer v. Thorley*, 4 B. & Ald. 91.

235. A fortiori, the bail to the sheriff are discharged if the plaintiff accepts a cognovit for the payment of the debt by instalments.

Per Mansfield, C. J. (a)—"A cognovit, except under particular circumstances, is a discharge of the sheriff. It certainly would be proper to inquire whether it is given with or without notice; but here it is without notice; and the question is, whether in that case it discharges him. The effect of this instrument was, that from the time of giving it, the defendant could not be taken by the sheriff. If other bail had been put in when the first were rejected, though they might have surrendered the defendant before giving this cognovit for payment by instalments, they could not do it after; and if they had taken him afterwards, he would have been entitled to his discharge. The duty of the sheriff is to bring in the body of the defendant: the defendant appears in Court and acknowledges the debt."

Per Heath, J.—"If fresh bail had been put in, and the defendant had then given a cognovit, authorizing the defendant to enter up judgment instanter, the bail might afterwards have rendered the defendant. But the security here taken is for a payment by instalments. This is like the case of a bill of exchange: if the holder does not proceed in due time against the acceptor, he discharges the drawer. Here a party elects a different remedy against the defendant, and thereby absolves the sheriff from his responsibility. So if a receiver takes security

(a) In *The King v. The Sheriff of Surrey*, 1 Taunt. 159. The most profound acquaintance with the general principles of the obligation of sureties is on all occasions displayed by this learned judge and his immediate successor (*Gibbs, C. J.*); and I strongly recommend to the student a careful and fre-

quent perusal of their judgments.

Upon several questions of the law of principal and surety, the Court of King's Bench has been influenced, in an important degree, by the decisions of the Court of Common Pleas during the time of these judges.

from a tenant, he makes himself liable. This cognovit is a new modification of the debt, and the plaintiff, by acquitting the defendant of the former debt, acquits the sheriff."

Per Chambre, J.—"Is not this very different from the case of bail. The defendant is in the custody of his bail, but here you treat him as being present in the Court. He appears in Court when he gives a cognovit, and the sheriff has done his duty when the plaintiff has accepted his appearance in Court; the sheriff has nothing further to do."

236. In *Charlton v. Morris (a)*, the bail (to the action) consented to the defendant's giving a cognovit on such terms as he could obtain from the plaintiff. A cognovit was given in February to pay in May, and default having been made in May, after some further negotiation with the defendant, which proved fruitless, the plaintiff left a ca. sa. against him in the secondary's office, to be returned non est inventus, and then proceeded against the bail and signed judgment against them. But the Court set aside the proceedings against the bail, thinking that according to the true construction of the agreement on the part of the bail, they ought to have had notice of the terms agreed upon between the plaintiff and defendant, or of the failure of the subsequent negotiations, supposing their agreement extended to those negotiations.

237. In like manner, in *Clift v. Gye (b)*, where the bail below consented to the plaintiff's taking a cognovit with a stay of execution for a month, the Court of King's Bench held, that, under such an agreement, the bail were entitled to notice of the default of their principal before proceedings could be taken against them; and, therefore, the plaintiff having taken an assignment of the bail bond, and commenced proceedings upon it, without giving notice to the bail, the Court set aside the proceedings. Lord Ten-

(a) 6 Bing. 427.

(b) 9 B. & C. 422.

terden, C. J. said—"They (the bail) enter into an agreement, the fair interpretation of which appears to be, that they shall remain liable, notwithstanding the cognovit, but that the time for putting in bail above shall be enlarged. I think that the time for so doing cannot reasonably be held to have expired until they received notice that the cognovit was unsatisfied: the proceedings against the bail were, therefore, commenced too soon, and ought to be set aside, but without costs."

238. Bail are likewise discharged by their own bankruptcy and certificate; the bail above if they are fixed, and the bail to the sheriff if the bail bond is forfeited, before they obtain their certificate (a).

Of the Appropriation of Payments.

239. The general rule is (b), that the party who pays money has a right to apply the payment as he thinks fit. If there are several debts due from him, he has a right to say to which of them the payment should be applied. If he does not make a specific application at the time of payment, then the right of application generally devolves on the party who receives the money. If there is only one account, and that a running account, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account (c). Presumably, in such a case, it is the first item on the debit side of the account which is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled. And the same principle applies to those accounts current in which, after the death either of any of the creditors or of the debtors, the account of the survivors

(a) *Dinsdale v. Eames*, 4 J. B. 65; S. C. 2 D. & R. 219. See the Moore, 350; *Littlewood v. Crowther*, 3 D. & R. 533.

(c) *Clayton's case*, 1 Mer. 572.

(b) *Simson v. Ingham*, 2 B. & C.

is kept as a continuation of the old account in which the deceased was interested, the old and the new account being consecutive, and making only one entire account together. Thus, in *Clayton's case* (a), payments made by surviving partners against whom there was a general account, including items which occurred in the life-time of the deceased partner, were held to extinguish the old debt; and in like manner in *Bodenham v. Purchas* (b), the converse of *Clayton's case*, payments made after the decease of one of the creditors, upon one continued account, which included items in the life-time of the deceased creditor, were held to apply to the oldest items.

From these rules no exception is made (c), nor relaxation, in favour of sureties; but any appropriation made by the party entitled at the time to appropriate, is binding alike on the surety as on the principal debtor; and the question in all cases is simply whether there has been an appropriation.

240. It has been held that an entry of payments to one account, if not communicated to the parties making the payments, does not preclude the creditor from appropriating them subsequently to any other account to which he might have originally appropriated them. Thus, in *Simson v. Ingham* (d), one of several parties who had an account with the plaintiffs as bankers, died in September, 1814; the surviving partners continued to bank with the plaintiffs, and *for a short time the old and new account were kept continuously*; but in November the bankers sent in the two accounts distinct from one another; the one made up to the day of the death of the partner, and the other commencing from that period. It was insisted that at that period the plaintiffs were precluded from separating the accounts, by the entries already made in their own books.

(a) *Suprà*, p. 221, n. (c).

(b) 2 B. & Ald. 39.

(c) "Unless by distinct agreement, the surety can have no controul over the way in which the principal shall make his payments."

Per Best, C.J. in Williams v. Rawlinson, 3 Bing. 75. S. C. 10 J.B.

Moore, 362.

(d) 2 B. & C. 65. S. C. 2 D. & R. 249.

But the Court thought otherwise, and *Bayley, J.* said, "If indeed a book had been kept for the common use of both parties, as a pass book, and that had been communicated to the opposite party, then the party making such entries would have been precluded from altering that account; but entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit."

Holroyd, J. said, "The persons paying the money not having made any direct application of it, the right of making such application devolved on the receiver; and if they have done any act which can be construed as such an application, it is equally clear that, although they did not apply it at the moment of the payment, they would have a right to make the application at a subsequent period. The question, therefore, is, whether, from any entry in the books, there appears to have been a complete election by them to apply the payments in any other way than they are applied in the accounts which have been actually delivered. Now these entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books shews only that the idea of so applying the payments had passed in their own minds. It is much the same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry the intention into effect."

Best, J. said, "It is said that this application of the money was made too late, and after the plaintiffs were precluded from so applying them, by their having previously entered them to the credit of the old firm. It is true Sir *William Grant* says, in *Clayton's* case, that by the civil law the application is given first to the debtor and then to the creditor, and that as well the creditor as

the debtor must make his election at the time of payment; and that unless such election be immediately made, the law will appropriate it in discharge of the most burdensome, and if all are equally burdensome, of the oldest debts. But, according to the cases there cited, our law does not require of the creditor an instant decision. I think that he has a reasonable time to decide to which account he will place a sum that has been paid him without any application by his debtor, and more than a reasonable time has not been taken by the plaintiffs. When once the creditor has made his election he is bound by it."

241. In *Shaw v. Picton* (a), it appeared that Lord *Alvanley* was the grantor of several annuities, and in consequence of an application to him by the attorney of the agent of the grantee, and a similar application to Lord *Foley*, his surety, a meeting took place between those parties; and that afterwards several sums of money were paid by Lord *Alvanley* to the agent, to whom the attorney had referred him. From these circumstances the Court inferred an intention on the part of Lord *Alvanley*, that the money should be appropriated to the account on which Lord *Foley* was liable as his surety. "It is contended," said *Abbott*, C. J. "that Howard and Gibbs (the agents of the grantee) had a right to apply these sums to the bill account" (another account in which Lord *Alvanley* was indebted), "and, perhaps, as between them and Lord *Alvanley*, they might be entitled so to do; but Lord *Foley* had a right to interfere, and say that they should not be so applied. They were obtained in consequence of the application to him, for it is plain that Lord *Alvanley*, in consequence of his remonstrances, paid the money in order to relieve Lord *Foley*. If the money was so paid, Lord *Foley* was thereby discharged from his liability."

242. In *Dunn v. Slee* (b) it seems to have been admitted, that if the creditor received money on the specific account of a security, in which some of the parties are sureties,

(a) 4 B. & C. 715; S. C. 7 D. & R. 201.

(b) Holt, 399.

the creditor is bound by the appropriation, but the evidence offered to establish the fact of the appropriation was deemed inadmissible. The evidence was a declaration of one of the obligees, made after the payment; and *Park, J.* said, "What West said at the time of payment, or at the time when payment was demanded from J Slee (the principal), was a fact that might be proved; it would be a part of the *res gestæ*; but any declaration made after payment, on what account he received the money, is no evidence against the plaintiff." But West might have been called. The action was by one surety against another for contribution.

243. In *Plomer v. Long (a)*, an action upon a bond, in which there was a surety, it was contended that the payments by the principal obligor subsequent to the execution of the bond, ought to be appropriated to the bond, in favour of the surety. But Lord *Ellenborough, C. J.* said, "The plea is payment, and the question is, whether the payment was made *animo solvente*. The general rule is, that where nothing is directed as to the application, the person who receives may apply it. In a Court of law this cannot be considered as a payment in discharge of the bond without some circumstances to shew that it was so intended."

244. In *Marryatts v. White (b)*, the action was upon a promissory note given by the defendant as a security for the price of flour to be delivered to the defendant's son-in-law, and under a stipulation that it should not be applied to a previously existing debt of the son-in-law. The flour delivered from time to time amounted to the sum of 239*l.* 16*s.* 2*d.*, and 209*l.* 18*s.* had been paid by the son-in-law, as to which the question arose whether it was to be considered as paid in liquidation of the old or new account. It appeared that the usual credit for flour was three months,

(a) 1 Stark. N. P. C. 101.

Birch v. Tebbutt, 2 Stark. N. P.

(b) 2 Stark. N. P. C. 101. See also C. 74.

and that for earlier payments a discount was allowed; and that in some instances payments having been made before the credit expired, discount had been allowed. Lord *Ellenborough*, C. J. said, "I think that in favour of a surety such payments are to be considered as paid on the later account. In some instances the payments were immediate, and in others before the time had expired within which a discount was allowed. Where there is nothing to shew the animus solventis, the payment may certainly be applied by the party who receives the money. The payment of the exact amount of goods previously supplied is irrefragable evidence to shew that the sum was intended in payment of those goods; and the payment of sums within the time allowed for discount, and on which discount has been allowed, affords a strong inference, in the absence of proof to the contrary, that it was made in relief to the surety."

CHAPTER VIII.

OF THE RIGHTS OF THE SURETY AGAINST HIS PRINCIPAL.

1. *Rights before Payment.*

245. As soon as the surety's obligation to pay is become absolute, he is entitled, in equity, to require the debtor to exonerate him, and he may file a bill to compel an exoneration, although the creditor has not demanded payment from him. In *Nisbet v. Smith* (a), the Lord Chancellor, arg. said, "It is clear, and never has been disputed, that a surety, generally speaking, may come into this Court, and apply for the purpose of compelling the principal

(a) *Ante*, p. 127.

debtor, for whom he is surety, to pay in the money and deliver him from the obligation." In *Lee v. Rook* (a), the defendant had borrowed money of Mr. Lee, who had raised it by a mortgage of the estate of Mrs. Lee, his wife, and Mr. Lee being dead, Mrs. Lee, the plaintiff, brought a bill to compel the defendant to pay off the mortgage money. And the M. R. said, "If I borrow money on a mortgage of my estate for another, I may come into equity, as every surety may against his principal, to have my estate disencumbered by him" (b).

246. But until either the debt is due, or the debtor has made default, which is the same thing, equity will not compel him to exonerate the surety, by bringing money into Court, by way of deposit, or in any other manner. Thus, where the principal in a bond which was to become due on the 1st of July, was going to America on the 1st of June, Lord *Thurlow*, upon a bill filed by the surety, refused the writ of *ne exeat regno*, on the ground that there was no debt due. That writ also was refused to sureties who applied for it in consequence of their principal not having given them the indemnity he had promised; because at the time of their application they were under no actual liability (c).

2. Rights after Payment.

247. If the surety has paid the debt of his principal, he is entitled to demand from him a reimbursement, and may obtain it either at law or in equity: at law, by an action of *indebitatus assumpsit* (d), under a count for money paid at the request and for the use of his principal; unless he

(a) Mos. 318. See also *Ranelagh v. Hayes*, 1 Vern. 190, and *Antrobus v. Davidson*, 3 Mer. 578.

(b) See also the latter part of the judgment of Lord *Eldon*, in *Cox v. Tyson*, 1 T. & R. C. C. 395.

(c) *Cock v. Ravie*, 6 Ves. 283.

See also *Antrobus v. Davidson*, 3 Mer. 569, on the general principles of this jurisdiction.

(d) *Warrington v. Furber*, 8 East's R. 242. See also *post*, p. 228, the judgment of *Buller, J.*

has taken from him a security of indemnification, in which case he cannot, in general, have the action of indebitatus assumpsit, but must resort to the security. In *Toussaint v. Martinnant* (a), the plaintiffs, on becoming surety for the defendant, took from the defendant a counter security, and, having paid the debt as surety, brought the present action, which was of indebitatus assumpsit. But *Ashurst, J.* said, "There is no doubt but that wherever a person gives a security by way of indemnity for another, and pays the money, the law raises an assumpsit. But where he will not rely on the promise which the law will raise, but takes a bond as a security, there he has chosen his own remedy, and he cannot resort to an action of assumpsit. Therefore in this case his only remedy is the bond." And *Buller, J.* said, "In ancient times no action could be maintained at law where a surety had paid the debt of his principal; and the first case of the kind, in which the plaintiff succeeded, was before *Gould, J.* at Dorchester, which was decided on equitable grounds. Now, why does the law raise such a promise? Because there is no security given by the party. But if the party choose to take a security, there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties: in the present case the plaintiffs have taken a bond, and therefore they must have recourse to that security."

248. In the case of *Crafts v. Tritton* (b), the defendant having given to a third person a security for the indemnification as well of the plaintiff as the person to whom it was given, it was held that the defendant was not liable, even at the suit of the plaintiff, to an action of indebitatus assumpsit for a cause to which the security extended, although the plaintiff could not sue upon the security, he not being a party to it. The case was as follows:—

John Crafts, the brother of the plaintiff, borrowed a sum of money on two several mortgages; one of his own

(a) 2 Term R. 100. (b) 8 Taunt. 365. S. C. 2 J. B. Moore, 411.

estate, and the other of an estate which was the joint property of himself and the plaintiff, his brother: and the plaintiff also joined John Crafts in a bond, as his surety. The defendant afterwards purchased of John Crafts that estate which was John Crafts' own separate property; and instead of paying the purchase-money to the vendor, he was to pay off the incumbrance of the plaintiff's estate; and in the purchase deed he covenanted with John Crafts, his vendor, to indemnify him and the plaintiff from any demand of the creditor. Had Tritton, the purchaser, paid the purchase-money as he ought, the creditor would have had no demand against the plaintiff, the surety: but he did not do so; and the plaintiff paid the money, and then brought an action of indebitatus assumpsit against Tritton, the purchaser. But the Court held the case to be within the rule already stated, namely, that where a counter security is given, the surety cannot have an action of indebitatus assumpsit, but must resort to his security; and as the defendant had covenanted with John Crafts to indemnify him and the plaintiff, the plaintiff should either have brought an action in the name of John Crafts, or have sued John Crafts himself, for whom he was originally the surety.

Per Gibbs, C. J.—"My brother *Best* has argued this question with great ingenuity and perspicuity, and has given great effect to his argument by confining himself absolutely to the material points of the case. I think it necessary to go through his propositions in order to shew where we agree with him, and where we differ from him. In this case, originally, Richard and John Crafts were sureties to Lasey for payment to him of the sum of 300*l.* by John Crafts; and two mortgages, or rather a mortgage on an estate, the joint property of Richard and John, were given. If Richard had paid, he would have paid as surety for John. Without deciding the point, I am much inclined to go thus far with my brother *Best*, in agreeing,

that if John had merely transferred to Tritton, the defendant, his interest in the estate which was subject to John's debt to Lasey, he would, by his own conduct, have substituted Tritton for himself, and made Richard the surety for Tritton; and that, if Richard had been forced to pay, he would have paid as surety for Tritton, who ought to have paid. But this proposition is founded on the supposition that John Crafts placed Tritton precisely in his place; whereas this case is widely different. Tritton purchased from John Crafts; he might have taken his conveyance without any intercourse with Lasey; and if he had been inclined to deal with Lasey he might have dealt with him on his own terms. But Tritton enters into a specific obligation by his purchase-deed; he is bound by that, and he confines himself to that specific liability which he by his deed has created, namely, to a covenant by himself with John Crafts, on behalf of John Crafts, and also on behalf of Richard Crafts; and the only remedy to which Richard Crafts can have recourse, is an action by John Crafts upon that covenant. The rule must, therefore, be discharged."

249. The counter security given by a principal to his surety is often made to fall due before the original debt; and in that case, it is scarcely necessary to observe, that the surety need not wait until he has paid the debt, to enforce the security, but he may enforce it at the time stipulated, and if it is a bond, as soon as the condition is broken.

In *Toussaint v. Martinnant* (a), the security given to the plaintiffs, who were surety for the defendant, was a bond, conditioned for the payment of the debt to the obligee before it would be due to the creditor: on which account it was contended the bond was bad, and, that being so, no action could be maintained upon it, and, consequently, that the plaintiff was entitled to maintain an

(a) *Antè*, p. 228.

action of indebitatus assumpsit: but the Court established the validity of such a bond (a).

250. In *Penny v. Foy* (b) also, the plaintiffs being the assignees of Robert Buncombe, for whom the defendant was surety in an annuity deed, the defendant pleaded a set-off under a bond which he had taken from Buncombe to secure to himself the payment of the accruing amounts of the annuity, and the judge, at nisi prius, thought the defendant entitled, under such a bond, to set off the arrears of the annuity without giving any evidence of having paid them. And in banc, *Bayley, J.* said, "I cannot agree that this is, as has been assumed, a mere indemnity bond. If it were, undoubtedly the surety must prove himself damnified before he could put it in suit; but I think it not so." And Lord *Tenterden, C. J.* said, "The case of *Toussaint v. Martinnant* (c) is an authority to shew that where there is a mere indemnity bond, the surety must shew that he is damnified, and that when he has done so the bond becomes forfeited. But here, part of the condition of the bond was, that the bankrupt should pay the annuity, and the indemnity was only another part of the condition. Default was made in payment of the annuity, and the bond thereby became forfeited. The defendant was entitled either to have the annuity paid by the bankrupt or to have the money deposited in his own hands to enable him to pay it; he was not bound first to pay it out of his own pocket and then apply to the bankrupt to reimburse him. As it is, he is liable for the arrears of the annuity, and he has no security or remedy except the bond which I think he had a right to put in suit as soon as default was made in payment of the annuity."

(a) Recognized in *Penny v. Foy*, 2 M. & R. 181, where *Bayley, J.* said "*Toussaint v. Martinnant* is an express authority that where a bond is given to a surety conditioned for the payment of the money, the surety may sue upon

it as soon as the condition is broken, although he has not been called upon to pay."

(b) 2 M. & R. 181; S. C. 8 B. & C. 11.

(c) Is not this citation a mistake of the reporter?

251. But the right of the surety to be reimbursed does not extend to payments made by him under an illegal engagement, to the illegality of which he was privy; and such payments he cannot recover against his principal, either as money paid at the request and for the use of his principal, or upon any counter security.

Thus, in *Bryant v. Christie* (a), which was an action on a bill of exchange, of which the plaintiff was the drawer and the defendant the acceptor, it appeared that the bill had been accepted by the defendant in consideration of a sum of money paid by the plaintiff to his brother, on behalf of the defendant, under the pretence of being the defendant's surety, but in reality (Lord *Ellenborough* conceived) as an inducement to the plaintiff's brother to accede to a composition which the defendant was making with his other creditors; and as Lord *Ellenborough* thought this only a circuitous mode of securing to the plaintiff's brother the full amount of his debt, contrary to good faith with the other creditors, the learned judge would not allow the plaintiff to recover.

252. Formerly a surety, who had paid a debt for which his principal was engaged by bond, might obtain in equity an assignment (b) of the bond, in order to put it in suit, in the name of the obligee, against the debtor, though the surety himself was a party to it. And whilst that practice continued, a surety for a bond debt, upon obtaining an assignment of the bond, or upon paying the debt, became a creditor of his principal, of the same rank as the original creditor; that is, a specialty creditor. But in consequence of the statute of Anne (c), that practice was dis-

(a) 1 Stark. N.P.C. 329.

(b) *Morgan v. Seymour*, 1 Cha. Rep. 64; *Ex parte Crisp*, 1 Atk. 135.

(c) "And certainly in the act of parliament for the amendment of the law this great difficulty arises,

that if one of two obligors pays off the money, the condition being forfeited by the day being past, and puts the bond in suit against the other in the name of the obligee, the other may plead that the other obligor had paid the principal and

continued (a), and now the surety ranks, in respect of his payment, as a simple contract creditor.

In *Copis v. Middleton* (b), upon the question of the rank acquired by the surety on paying the debt of his principal, the Lord Chancellor delivered the following judgment:—

“The facts of this case are simply these:—Two individuals gave a bond, the one as principal and the other as surety; no other assurance was executed at the time, no mortgage was made to secure the debt, no counter-bond by the principal to the surety; and the question to be decided is, whether the surety, having paid the bond after it was due, is a simple contract or a specialty creditor. I understood it to have been the opinion of the master, an opinion founded on one or two cases which have been stated, that the surety was to be considered as a specialty creditor, to stand in the place of the person whom he paid; that doctrine appears to me to be contrary to all that has been settled during the whole time I have been in this Court: every thing that was arranged in bankruptcy before the late statute enabling the surety to prove, every thing determined before, appears to me to have authorized the Court to consider it quite clear, that if there was nothing in the case beyond what I have stated, the surety having paid the bond would be nothing more than a simple contract creditor in respect of that payment; the bond was not assigned to any body in consideration of a sum of money paid, which was one way we used to manage these things; there was no counter-bond given,

interest on that bond before bringing the action. And I believe instances of that have been of bills in this Court for relief, but that depends on proof of payment; but no man can plead payment of money on a bond at a day, or after the day, by any one but the obligor. He cannot plead payment by a stranger, for that is answerable; it is no plea; he must plead

payment by himself, or some person bound in law to payment, which could not be done in this case.” *Per* the Lord Chancellor, in *Bishop v. Church*, 2 Ves. 372.

(a) *Gammon v. Stone*, 1 Ves. sen. 339; *Woffington v. Sparkes*, 2 Ves. sen. 564.

(b) 1 Turn. C. C. 224; *Robinson v. Wilson*, 2 Mad. R. 435.

which was another way in which we used to manage these things, so that if the surety paid one bond, he became instantly a specialty creditor by virtue of the other bond. If any suit was now instituted, I apprehend the payment of the bond would shew that the bond was gone. There has been a case cited where, upon the general ground that the surety is entitled to the benefit of all securities which the creditor has against the principal, it seems to have been thought that the surety was entitled to be as it were a bond creditor by virtue of the bond; I take it to be exceedingly clear, if, at the time a bond is given, a mortgage is also made for securing the debt, the surety, if he pays the bond, has a right to stand in the place of the mortgagee; and as the mortgagor cannot get back his estate again without a conveyance, that security remains a valid and effectual security, notwithstanding the bond debt is paid; but if there is nothing but the bond, my notion is, that as the law says that bond is discharged by the payment of what was due upon it, the bond is gone, and cannot be set up. That is the opinion which I have formed of this case."

3. Rights after Payment, in case of the Bankruptcy of the Principal Debtor.

253. If the surety pays the debt before the commission issues against the debtor, the debt paid becomes a debt to the surety, and, therefore, in this case, the surety may prove under the general section, like a common creditor.

If the surety has not paid when the commission issues, but pays afterwards, his right under the commission is provided for by the 52d section of the bankrupt act (6 Geo. 4, c. 16); which is a re-enactment of the 8th section of the statute 49 Geo. 3, c. 121, with some additions; and which is as follows:—

"And be it enacted, that any person who, at the issuing the commission, shall be a *surety* (a), or liable for any debt of the bankrupt, or *bail for the bankrupt*, either to the

(a) A surety to the Crown is within this enactment. See *Westcott v. Hodges*, 5 B. & Ald. 12.

sheriff or to the action, if he shall have paid the debt, or any part thereof, in discharge of the whole debt, (although he may have paid the same after the commission issued,) if the creditor shall have proved his debt under the commission, shall be entitled to stand in the place of such creditor as to the dividends and all other rights under the said commission, which such creditor possessed, or would be entitled to in respect of such proof; or if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment, as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety liable or bail as aforesaid, after an act of bankruptcy committed by such bankrupt; provided that such person had not, when he became such surety or bail or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

254. An analysis of this enactment presents the following amongst other propositions: First, That the surety must have paid either the whole of the debt, or a part of it in discharge of the whole, so as to extinguish the claim of the creditor, or he is not entitled to the benefit of this section. And, therefore, if he has paid only part of the debt, not in discharge of the whole debt, but merely in discharge of himself, leaving the creditor a claim for the residue against the estate of the principal debtor, he is not entitled to prove the part paid as a debt in virtue of this section.

Thus, in *Soutten v. Soutten* (a), the action was for money expended to the defendant's use: only the general issue was pleaded; but in fact, the defendant had become bankrupt and obtained his certificate, and had offered, at the trial, a plea of bankruptcy puis darreign continuance, which the judge (*Abbott, C.J.*) refused to receive; and the question considered by the Court was, whether the plea of bankruptcy, supposing it to have been received,

(a) 1 Dowling & Ryland, 521; S. C. 5 B. & Ald. 852.

was a bar to the action; and the Court adjudged it not a bar, but that the defendant was liable. The facts under adjudication were as follow:—

The defendant had been surety for the plaintiff for 1970*l.* by a joint warrant of attorney, on which judgment was entered on the 5th of April, 1816, and on the 9th of March, 1818, the defendant became bankrupt. At the time of the bankruptcy, 1337*l.* 15*s.* was due upon the warrant of attorney, and Bodfield, the creditor, proved this sum under the commission. On the 14th of March, 1818, the plaintiff and Bodfield entered into an agreement, in pursuance of which the plaintiff paid 500*l.*, and Bodfield accepted it in full satisfaction of his demand, so far as the plaintiff's liability was concerned, but not so as to affect his claim for the remainder under the defendant's commission. Satisfaction was not entered on the judgment roll of the warrant of attorney until after the allowance of the defendant's certificate.

Upon these facts the Court said, "We are of opinion that this action is maintainable, as for money paid by the plaintiff to the use of the defendant. It is evidently a payment in discharge of part of the debt for which the plaintiff became liable as a surety. It does not appear to us that the plaintiff is in a better situation by the arrangement between him and Bodfield, than he would have been had not such an arrangement been made. The original creditor, Bodfield, who had proved his whole debt under the defendant's commission, had a right to say, 'I will take under the commission all the money I can get, and when I have obtained all the commission will produce, I will call upon you, the surety, for the remainder.' The plaintiff, therefore, is in no better situation by the accidental circumstance, as it is called, of his paying 500*l.* in discharge of his own liability. The argument which has been urged would come to this, that if Bodfield had obtained 10*s.* in the pound upon the original debt under the commission, and by that means had exhausted the bankrupt's estate, and the surety had afterwards paid the

remaining 10s., the latter would have a remedy against the defendant, his principal, for the money so paid, if no satisfaction had been entered upon the record, but if satisfaction was entered he would lose all benefit. It cannot be said that entering satisfaction on the record at an earlier period would have put the defendant in a better situation, for if it had been entered while the proceedings under the commission were going on, the plaintiff would have lost the chance of any future dividend, because then the case would have come within the words of the 49 Geo. 3, c. 121, s. 8. It can make no difference to the principal whether the surety pays the money before or after all the funds are exhausted under the commission. All that is effected by the statute is, that if the surety pays the debt, or part of it, he merely puts himself in the situation of being able to prove the debt under the commission, and taking his dividend without disturbing the order of other dividends; but according to the argument here, if he had paid the whole of the debt, he would not have been entitled to any relief. The mere circumstance of paying part of the debt is no reason why the plaintiff is to be deprived of his remedy. The object of the statute is very plain. If the surety pays the whole of the debt, the original creditor is entitled to no advantage under the commission; but if he only pays a part, it merely operates as a discharge of the debt *pro tanto*, and the surety is at liberty, if he pleases, to stand in the situation of the original creditor in respect of the part he has paid, and is to have the benefit of such dividends as the bankrupt's estate produces. But here the whole of the bankrupt's estate is exhausted, and it cannot be said that the plaintiff is to lose all the benefit, because of the arrangement between him and the original creditor. This is clearly a payment to the use of the defendant for which an action will lie."

255. But, secondly, if the surety has paid the whole of the debt, or a part of it in discharge of the whole, he is entitled to the benefit of this section, whether the creditor

has proved under the commission or not; if the creditor has proved, he is entitled to stand in his place as to the dividends and all other rights under the commission; and if the creditor has not proved, then he is entitled himself to prove: and it may be added, that in either of these cases, the certificate discharges the bankrupt from future liability to his surety in respect of such payments of the surety.

256. The bail of a bankrupt, by an express designation, are entitled to the benefits of the 52d section, in like manner as persons who are "sureties," or "liable for any debt" of the bankrupt. And therefore to an action by the bail against their principal, in such cases as *Goddard v. Vanderheyden* (a), *Hewes v. Mott* (b), and *Newington v. Keeys* (c), where the demand of the bail accrued before their principal obtained his certificate, but after the commission issued, the certificate would be a bar, and the surety could not now recover. In the first-mentioned case the plaintiff became bail for the defendant in May, 1763: in T. T. 1763, judgment was obtained against him on the bail bond in the C. B., and affirmed in the Exchequer Chamber in T. T. 1764, and in January, 1765, a writ of error upon it to the H. L. was nonprossed. In this latter month, the plaintiff paid the amount recovered, under process of execution. In March, 1764, the defendant became a bankrupt, and in May, 1765, he obtained his certificate: which the Court held not to be a bar to the action, there being no such provision in favour of bail as that of the 52d section. The Court said, "The damnification did not accrue till the plaintiff had actually paid the debt and costs for the defendant, there being still a possibility that the original plaintiff might have received them from defendant, that therefore this was not a debt till then, and so not protected by the defendant's previous bankruptcy." But under the 52d section the bail in

(a) 3 Wils. 262; S. C. 2 W. Bl.
794.

(b) 6 Taunt. 329.
(c) 4 B. & Ald. 493.

such a case might prove, and therefore would not be entitled to recover, in respect of their damnification, against their principal: and bearing this in mind, the reader will not require any further illustrations on this subject.

257. It will be expected that I should allude to the cases of that third class coming under the designation of persons "liable for any debt of the bankrupt," who, though improperly, are often called sureties.

If, upon a dissolution of a partnership, one partner takes upon himself the obligation of paying the debts of the firm, these debts, as between such partner and his co-partners, are regarded in equity as the debts of the one partner; and it follows that the continuing liability of the other partners, as towards the creditors, is, in the same point of view, a liability for the debt of another; whence it is that the retiring partners, under such circumstances, have come to be called sureties, though sureties they are not, according to the definition of a surety, because, both in equity and at law, their liability towards the creditor is primary, that is, they are essentially principal debtors. Such partners, however, are entitled to prove against the estate of their co-partner, in virtue of the above section, as persons liable for the debt of their bankrupt partner.

258. Thus, in *Wood v. Dodgson* (a), the plaintiffs declared upon an indenture, in which, after a recital that the plaintiffs and defendant had agreed to dissolve a partnership which had existed between them for some years, the defendant covenanted to pay all the debts due from the partnership, and to "indemnify the plaintiffs from the payment of the same, and also from all actions and costs which might arise by reason of the non-payment of them." The plaintiffs assigned as a breach of this covenant, that on the 16th of February, 1813, they were sued by one Wylie upon a bill of exchange, dated the 4th day of July, 1810, which had been accepted by the firm for a debt due

(a) 2 M. & S. 195. See also *Moody v. King*, 4 D. & R. 30. S. C. 2 B. & C. 558.

from the firm before the making of the indenture, and that they had paid 121*l.* 18*s.* 6*d.* in discharge of the bill and action. The defendant pleaded, that on the 15th of April, 1812, he became a bankrupt, and a commission was issued against him; that he had since obtained his certificate, and that the plaintiffs might have proved the said sum of 112*l.* 18*s.* 6*d.* under the commission. To this the plaintiffs demurred: the Court thought the plea good, and gave judgment for the defendant.

Lord *Ellenborough*, C. J. said, "This is quite a new case, and depends entirely upon the words of the statute (49 Geo. 3, c. 121), but I cannot help thinking it falls within them. Before the statute, this debt could not have been proved under the commission. The statute does, indeed, seem to impose a hardship on the plaintiffs, but at the same time they will not be in a much worse situation than if they were to pursue a fruitless suit. The words of the statute are, "where any person shall be surety for or liable for any debt of the bankrupt." Here the plaintiffs have assigned all their interest in the partnership effects, in consideration of a covenant of indemnity on the part of the bankrupt, which left them still liable as before to the original creditors of the partnership; they were liable at law as co-debtors with the bankrupt for his and their own debt, but *in equity he was solely liable* (a), and they were sureties, for by the covenant he became, as between the parties to the covenant, the principal debtor, the debt was his debt, although as to other parties the plaintiffs still remain liable, and, therefore, when they paid this debt, they paid it in his discharge. I cannot, therefore, say that this case does not fall within the act of parliament, which does not merely contemplate legal but equitable liability."

(a) That is, he was regarded, as of view, though not in a general point of view, they were his sureties, as solely liable: and in this point

259. In like manner, in *Parker v. Ramsbottom* (a), upon an issue directed by the Lord Chancellor, to try whether the plaintiff was entitled to prove any and what debts under a commission of bankrupt awarded against four persons with whom the plaintiff had been in partnership, the Court of K. B. decided, that he was entitled to prove the amount of certain partnership debts paid by him since the bankruptcy, but which the bankrupt ought to have paid according to an agreement entered into upon the dissolution of the partnership.

260. If the surety, bail, or person liable for one who has become bankrupt does not pay the debt until after the bankrupt obtains his certificate, such surety, bail, or person liable, is not barred by the certificate, but may, as appears from the next case, obtain a reimbursement of the sum paid from the bankrupt, notwithstanding his certificate.

Thus, in *Dally v. Wolferston* (b), the plaintiff and defendant had been partners; and it was awarded that the defendant should pay the plaintiff 1400*l.* and pay certain partnership debts; the defendant afterwards became a bankrupt, and the plaintiff proved his private debt of 1400*l.* under the commission.

After the commission issued, the plaintiff was sued separately upon a joint and several bond given by himself and the defendant to their bankers, for a debt of the firm, and, after a verdict against him, he made an arrangement, under which he paid the sum recovered, by instalments ;

(a) 5 Dowling & Ryland, 138; 3 B. & C. 257.

(b) 3 D. & R. 269. Professor Christian, after observing with relation to the 8 sect. of the stat. 49 Geo. 3, c. 121, under which this case was decided, "that the statute has clearly expressed that the surety can only come in under the commission when the creditor's claim is completely discharged," in answer to the question, "What

then must the surety do, if the creditor neither proves nor calls upon him to pay before a final dividend," says, "He may still compel the surety to pay, and the surety can receive nothing under the commission,"—and adds, "and the bankrupt will be discharged from any future demand of his surety by his certificate;" which is a mistake, according to the above case.

and then took out execution upon a warrant of attorney given him by the defendant as a security against this and other liabilities which he was under for the defendant, who has not obtained his certificate. A motion was made to set aside the execution, but the Court discharged the rule. And *Abbott*, C. J. said, "as to the partnership debt I think the case is not within the 49 Geo. 3, c. 121, s. 8, inasmuch as no part of that debt was paid until after the bankruptcy; neither do I think the case comes within the 14th section, which prohibits a creditor from maintaining an action against the bankrupt after he has elected to prove his debt under the commission, because it is clear that the debt must be such as was capable of proof at the time the commission was sued out. Now here it does not appear that the debt was capable of being proved, for in point of fact it was not due at the time the commission was sued out."

261. An acceptor for the accommodation of another, although no longer considered as a surety with relation to the holder, may still be so considered with relation to the party accommodated, and either in that character, or as a person liable for the debt of him accommodated, is entitled to the benefit of the 52d section, in case of the bankruptcy of the latter.

In *Stedman v. Martinnant* (a), to an action for money paid by the plaintiff to the use of the defendant, the defendant pleaded his bankruptcy and certificate. It appeared that the plaintiff had accepted a bill for 234*l.* 11*s.* for the accommodation of the defendant, who, before the bill became due, committed an act of bankruptcy, upon which a commission issued, and afterwards the bill was dishonoured: but this commission was superseded, and another bill was drawn by the defendant, and accepted by the plaintiff for the same debt, with an addition only for interest and stamp. Afterwards, a second commission issued upon the original act of bankruptcy, and pending this commission, the plaintiff paid the bill. The Court

(a) 13 East's R. 427. The cases under the 49 Geo. 3, c. 121, s. 8, may be considered as decided under the 6 Geo. 4, c. 16, s. 52, the latter being only a re-enactment.

thought the plaintiff might have proved the debt, and therefore that he was not entitled to recover in this action.

Lord *Ellenborough*, C. J. said, "The giving of the second acceptance upon the new bill did not discharge the original debt for which the plaintiff had become surety before the act of bankruptcy; and in paying that second bill, the plaintiff was only paying the same debt which he was liable to pay as surety for the defendant upon the first bill. Then is not this a case within the 8th section of the statute referred to (49 Geo. 3, c. 121,) by which the surety for a debt proveable under a commission, though not paid by him till after the issuing of the commission, shall stand in the place of the original creditor as to the whole of the debt so paid. The act, however, provides that this shall not extend to one who, when he became surety, had either notice in fact of the act of bankruptcy committed, or implied notice from the issuing of a commission, though such commission were afterwards superseded. But in order to affect the plaintiff's debt with such implied notice, it was necessary for him to bring down the commencement of the suretiship to a period subsequent to the issuing of such commission afterwards superseded, which he has failed to do, and therefore it stands as a debt which was proveable under the commission, and is, consequently, barred by the defendant's certificate."

262. In like manner, in *Vansandau v. Corsbie* (a), a case in the Court of Common Pleas subsequent to that of *Fentum v. Pocock*, in which the doctrine that an accommodation acceptor was a surety, was overruled, that Court decided an accommodation acceptor to be within the 49 Geo. 3, c. 121, s. 8. The case was as follows:—the plaintiff accepted a bill for the accommodation of the defendants before their bankruptcy, and paid it afterwards, but before the defendants obtained their certificate. The declaration stated a promise by the defendants to provide funds to take up the bill, and a breach of this promise,

(a) 8 Taunt. 50; S. C. 2 J. B. Moore, 602.

whereby the plaintiff had been obliged to pay the costs of an action against him upon the bill, and to give a cognovit for the amount of the bill; and had also been obliged to sell an estate in order to raise money to satisfy the cognovit. The defendants pleaded their bankruptcy and certificate. To which the plaintiff demurred. And the Court gave judgment for the defendant.

Dallas, C. J. said, "If one man accept a bill for the accommodation of another, and the party accommodated undertake to provide money for it when it becomes due, and fail to make such provision, though all this happen before the bankruptcy, and the acceptor pay the bill after the bankruptcy, and though there be no counter bill for security, the acceptor who pays it is such a surety that he may claim the benefit of the stat. 49 Geo. 3, c. 121, s. 8. This is a remedial law in aid of the bankrupt, and if any man shall pay after the commission, or before, any debt for which he has rendered himself liable before, he shall be permitted to prove under the commission. Here the plaintiff was a surety before the bankruptcy, and having reduced the damages to a certainty by payment after the bankruptcy, he may now come in and avail himself of the remedy which is to be found in the statute." And upon a writ of error, the Court of King's Bench affirmed the judgment.

Abbott, C. J. said, "That" (alluding to the case of *Wood v. Dodgson* (a)) "is quite decisive of this case. Here the principal ground and cause of action, supposing the statute 49 Geo. 3 had never passed, is the recovery of a sum of money paid by the plaintiff as acceptor upon the bill; and if an action had been brought he might not only have recovered that money, but perhaps also the special damage which he had incurred in order to raise money to pay the bill. That damage, however, could only have been recovered as an accessory to the principal debt; this is a novel attempt to separate the accessory

(a) *Ante*, p. 239.

from the principal; and it seems to me that in point of law that cannot be done. If we were to give effect to this action, we should in a great measure defeat the object of this very beneficial statute, which was intended to relieve the bankrupt from all claims of the surety arising out of the original debt."

Bayley, J. said, "I am of the same opinion. If the statute of the 49 Geo. 3 had never passed, if the plaintiff had been arrested upon the bill, and in order to pay it he had sold his estate at a loss, he could not then have brought two separate actions, first, for the money which he had paid, and secondly, for the special damage which he had sustained by the sale of his estate. The plaintiff here is a surety; now the 49 Geo. 3 enables the surety to prove his demand in respect of such payment as a debt under the commission; and then it enacts that the bankrupt shall be discharged of all demands at the suit of the surety in regard to his debt in respect of such suretiship; now it seems to me that, under this clause of the act, the certificate is a bar not only to any claim for the money which constituted the original debt, but a bar also to any demand for accessory injuries arising out of the debt, and which accessory injuries could only be the subject of the same action brought by the plaintiff to recover the money. In my judgment the statute makes the certificate not only a bar to the principal debt, but also to any consequential damage arising from that debt not having been duly paid. If this were not the proper construction of the statute, I cannot see why any creditor of a bankrupt subsequently to the 5 Geo. 2, who had incurred special damage in consequence of having been arrested, or of having been bound to pay costs, should not have brought an action for such consequential injury, but no such action was ever heard of; and with respect to costs, it has been decided that they are in the nature of an accessory, and that when the right to the principal is barred, the right to the accessory is barred also. If that be so, there does not seem to be any

distinction in principle between an arrest, which is a restraint on the person, and the payment of costs, which is a restraint on the purse. I think that this declaration attempts to sever that which is not severable in point of law, and I think, therefore, that the judgment of the Court of Common Pleas ought to be affirmed."

263. The section of the 49 Geo. 3, c. 121, corresponding with the 52d section, now under consideration, was held to apply only to cases in which the debt paid by the surety subsisted as a debt at the time of the issuing of the commission: for instance, upon a lease there is no debt for rent until the period at which rent becomes due; and therefore a surety for rent, paying rent which accrues after the issuing of a commission against his principal, but before a final dividend, cannot prove in virtue of the 52d section; the debt paid in such a case not having been a debt at the issuing of the commission.

Thus, in *M'Dougall v. Paton (a)*, to assumpsit for money paid by the plaintiff for the defendant, the defendant pleaded his bankruptcy and certificate, and that the plaintiff, before the issuing of the commission, was surety for the defendant's debt, and that the money paid was paid by the plaintiff as surety after the issuing of the commission and before a final dividend. The plaintiff replied, that before the issuing of the commission he was surety to John Inglis for the defendant, that the defendant should perform certain articles of agreement which he had entered into with Inglis, one of which was for the payment of a certain annual rent by the defendant; and that after the alleged bankruptcy three years of this rent was due and the plaintiff paid it; and that the money so paid, with the costs of an action brought against the plaintiff in consequence of the defendant's non-payment, was the money for which the plaintiff brought his action. The defendant demurred.

(a) 2 J. B. Moore, 644. S. C. 8 Taunt. 584.

Dallas, C. J. said, "The plaintiff in this case was a surety for the payment of rent by the defendant to Inglis. The defendant became bankrupt and obtained his certificate, at which period no rent was in arrear or due from him to Inglis. The plaintiff, however, was afterwards called on to pay rent, which he did, and now seeks to recover it from the defendant by the present action. I think it is perfectly clear, that where a person is to be considered as surety, or liable for the debt of a bankrupt, within the meaning of the words of the 49 Geo. 3, c. 121, s. 8, such debt must exist as a debt at the time of the issuing of the commission. Can it be contended that in a case where no rent is due or in arrear at the time of suing out the commission, that such rent can be considered as a debt proveable under it? In point of fact no debt was due whatever from the bankrupt himself at the time of the bankruptcy. It appears by the plaintiff's replication, that the rent became payable after that period. In *Stedman v. Martinnant* the acceptance must have been considered as a debt due at the time the commission was issued; but whether it were so or not, it is now unnecessary to consider, as this case appears to me to be wholly undistinguishable from that of *Welsh v. Welsh*. Still I think that the legislature, when the statute was passed, merely looked to those creditors who were entitled to prove existing debts of the bankrupt at the time of the commission; but as this case may not be entirely governed by that of *Welsh v. Welsh*, I wish to look into the other authorities before I give a conclusive opinion."

Afterwards *Dallas*, C. J. said, the Court retained this opinion, and therefore judgment was given for the plaintiff.

264. If the surety had taken from his principal a bond conditioned for the payment to himself of the debt for which he was surety, or of any fixed sum as an indemnity, it was at one time held (a) that the surety might prove under

(a) See *Martin v. Court*, 2 Term R. 640; *Toussaint v. Martinnant*, *ibid.* 100; *Hodgson v. Bell*, 7 Term R. 97.

a commission against his principal, as a creditor upon the bond, if the bond was forfeited, though he had not paid the debt, or the debt was not due to the creditor. But in the present day (a) the surety is not allowed to prove, even under such a security, until after payment.

265. A creditor whose debtor has been discharged under the insolvent debtors' act (7 Geo. 4, c. 57,) may still recover his debt from the surety; and the surety having paid, may recover from the insolvent, although the liability of the surety was absolute before the insolvency.

In *Powell v. Eason* (b) the plaintiff sought to recover the amount of a promissory note made by him to accommodate the defendant, which he paid in December, 1830. The defence relied upon was, that in February, 1830, the defendant was discharged under the insolvent debtors' act, having first filed his schedule, and that the note being due at that time, the amount of it was specified in the schedule as the debt of Bell, to whom the note was given. The plaintiff obtained a verdict, and the Court thought him entitled to it.

Per Tindal, C. J.—"I think the verdict for the plaintiff ought to stand. The question arises on the construction of the insolvent debtors' act, and we are to take the description of the debts from which the insolvent is to be discharged from the tenth and forty-sixth sections of the act. The tenth, which authorises the insolvents' petition, describes them 'as the demands of all persons who shall claim to be creditors of such prisoner at the time of presenting such petition.' And section forty-six authorises his discharge from custody 'as to the several debts and sums of money due, or claimed to be due, at the time of filing such prisoner's petition.'

Then was the plaintiff a creditor of the defendant at the time of presenting his petition. There was no debt as between him and the defendant, the debt was due from the defendant to Bell, the plaintiff was no more than a

(a) *Ex parte Finden*, Cook's B.

(b) 8 Bing. 23.

L. 170; *Ex parte Brown*, *ibid.*

surety, and consequently no creditor at the time of the discharge. As a confirmation of this view of the subject, we find that in an act passed the year before, the bankrupt act 6 Geo. 4, c. 16, a machinery is employed to relieve the bankrupt from the claim of a surety, for he may pay the debt and stand in the place of the original creditor. There is no such clause in the present act, from which we may infer that the legislature intended to discharge a bankrupt from such claims, but not an insolvent."

Gaselee, J. said, "I am of the same opinion. There is no possibility for a surety to claim under the insolvent debtors' act, except by paying the debt before the insolvent's discharge."

Bosanquet, J. said, "The plaintiff is entitled to retain his verdict: the debt for which he sues became due subsequently to the discharge of the insolvent; and there are no words in the act which relieve the insolvent from such claim. The relief is confined to debts due at the time of the discharge. As to debts to become due by bond, annuity, or *otherwise*, the fifty-first section, which applies to them, cannot include a debt like this, for it says the Court shall ascertain the value, regard being had to the original sum or sums of money, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the time of filing such prisoner's petition."

And *per Alderson, J.*, "The fifty first section was meant to benefit annuity creditors, by enabling them to claim for the whole amount, instead of the mere arrears due at the time of the discharge."

266. In *Macdonald v. Bovington (a)*, the defendant, the acceptor of a bill, having been sued by the holder and charged in execution, was discharged under the Lords' Act. The holder afterwards recovered the amount from the plaintiff as the drawer of the bill; and then the plain-

(a) 4 Term R. 825.

tiff brought the present action. The action was upon the bill, and the defendant relied on his discharge under the Lords' Act as a bar to this action. But Lord *Kenyon*, C. J. said, " Nothing could be clearer than that this was not a satisfaction of the debt as between these parties, though it was as to Thompson; that it was a mere formal satisfaction, even to the holder, not like actual payment; that this plaintiff, having been obliged to pay the amount of the bill since the defendant was charged in execution at the suit of Thompson, had a right to have recourse to this defendant as acceptor; for that by his payment a new cause of action arose against the defendant, which he might enforce without regard to what passed in the former action."

4 Rights of Annuity Surety in case of the Bankruptcy and Insolvency of the Grantor.

267. The section of the statute 49 Geo. 3, c. 121, corresponding with the 52d section, which has just been considered, was held not to extend to a surety for the payment of an annuity, except so far as related to arrears of the annuity due and paid by the surety at the date of the commission: and, therefore, where the surety had redeemed the annuity subsequently to the bankruptcy of the grantor, he was thought entitled to maintain an action for the value, although the bankrupt had obtained his certificate, and the grantee had proved under the commission, in virtue of the 17th section of the first mentioned statute. And in *Welsh v. Welsh* (b), where the surety of an annuity, having been compelled by the grantee (annuity creditor) to pay the arrears, which became due subsequently to the issuing of the commission, brought an action to recover this payment from the grantor, who pleaded his bankruptcy and certificate; the Court thought the surety entitled to

(a) *Flanagan v. Watkins*, 3 B. & Ald. 186. Affirmed in error to the Exchequer Chamber. 1 Bing. 413.

(b) 4 M. & S. 333. See also *Page v. Bussell*, 2 M. & S. 553; et *Browne v. Lee*, 9 D. & R. 700; 6 B. & C. 669.

recover; and Lord *Ellenborough* said, "The surety cannot compel the annuity creditor to come in and prove, and it is not a debt quoad the surety, until he is in a condition to be damnified by it. If the legislature intended such a case as this, they have not so said, nor have they used language sufficiently clear to enable us to say so." But now, by the 55th section of the present bankrupt act (a), it is provided that the surety himself shall not be liable for arrears of the annuity until the annuitant shall have proved under the commission against the grantor for the value, and that the certificate shall discharge the grantor from all claims both of the grantor and of the surety.

268. The fifty-first section of the Insolvent Debtors' Act, 7 Geo. 4, c. 57, provides for the valuation of annuities granted by insolvents, and discharges the insolvent from the annuity, as towards the grantee; but it leaves the surety still liable to the grantee, and the insolvent to the surety, for payments made by the surety after the insolvency. This section is as follows:—

"And be it further enacted, that the discharge of any such prisoner so adjudicated as aforesaid, shall and may extend to any sum of money which shall be payable by way of annuity or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities of any nature whatsoever; and that every person and persons who would be a creditor or creditors of such prisoner for such sum or sums of money, if the same were presently due, shall be admissible as a creditor or creditors of such prisoner for the value of such sums of money so payable as aforesaid; which value the Court shall, upon application at any time made in that behalf, ascertain, regard being had to the original price given for such sum or sums of money, deducting therefrom such diminution in the value thereof, as shall have been caused by the lapse of time since the grant thereof, to the time of filing such prisoner's petition; and such creditor or creditors shall be entitled in respect of such value to the benefit of all the

(a) See *antè*, p. 108, *et seq.* *Bell v. Billton*, *Hone v. Morgan*.

provisions made for creditors by this act; without prejudice nevertheless to the respective securities of such creditor or creditors, excepting as respects such prisoner's discharge under this act."

In *Freeman v. Burgess (a)*, a case under the 10th section of the statute 1 Geo. 4, c. 119, corresponding with the above, it appeared that the plaintiff was surety for an annuity of which the defendant was the grantor; that the defendant had obtained an adjudication of discharge as an insolvent debtor; that since the discharge, the plaintiff had paid arrears of the annuity for which he arrested the defendant, and upon motion for the defendant's discharge from this arrest, the Court of Common Pleas unanimously thought the arrest lawful.

269. Bail, like other sureties, are entitled to recover from their principal the expenses they are put to in consequence of their obligation. And therefore the principal having absconded, he was held liable for the expenses incurred in sending in search of him, in order to render him, but not for the expenses incurred by the bail in defending an action brought against them by the person whom they had employed for that purpose. "The relation," said Lord *Ellenborough*, "of principal and bail is this: The principal engages to indemnify the bail from all expenses fairly arising from his situation as bail. I think indemnity goes against all charges which are necessary to secure themselves. The bail have a right to surrender their principal in their own discharge, and for their own security. If therefore the principal absconds, so that he cannot be had, the bail may take every proper and necessary step to secure him (b)."

Rights of the Surety with relation to the Creditor.

270. The surety who has paid the debt of his principal, is entitled to stand in the place of the creditor as to all securities for the debt, held or acquired by the creditor, and to have the same benefit from them as the creditor.

(a) 1 M. & P. 91.

(b) *Fisher v. Fallon*, 5 Esp. N. P. C. 171.

In *Craythorne v. Swinburne* (a), the Lord Chancellor, arguendo, said, "A surety is entitled to every remedy which the creditor has against the principal debtor; to enforce every security, and all means of payment; to stand in the place of the creditor, not only through the medium of contract, but even by means of securities entered into without his knowledge, having a right to have those securities transferred to him though there was no stipulation for it, and to avail himself of all those securities against the debtor."

271. The earliest leading case confirmatory of this right was *Parsons v. Briddock* (b). There the plaintiffs were bound as sureties, and their principal being arrested, the defendants became his bail, and were fixed, and afterwards judgment was obtained against them. The creditor also sued the plaintiffs, (the sureties), who thereupon paid the debt, and brought their bill for the purpose of obtaining an assignment of the judgment recovered by the creditor against the defendants, as the bail of their principal. And the Lord Keeper ordered the assignment, and said, "the bail stand in the place of their principal, and cannot be relieved on other terms than on payment of principal and interest, and costs, and that the sureties in the original bond (the plaintiffs) are not to be contributory." So that, as the Master of the Rolls (Sir *William Grant*), in a modern case, observed, though the bail were themselves but sureties as between them and the principal debtor, yet, coming in the room of the principal debtor as to the creditor, it was held, that they likewise came in the room of the principal debtor as to the surety, and consequently the surety has the same right that the creditor had, and is to stand in his place.

Of this right, the case in which the observation was made, *Wright v. Morley* (c), is a further illustration. In that case, Mr. St. Albin, the grantor of an annuity, with the consent of his wife, though she was not a party to the instrument, as-

(a) 14 Ves. 162.

(b) 2 Vern. 608.

(c) 11 Ves. 12.

signed to the grantee, as a security for the annuity, certain government stock, to which his wife was entitled under the will of a former husband, and which was vested in trustees for her. Mr. St. Albin having gone abroad, and the trustees having refused to pay the annuity, the plaintiff paid it as surety, and filed the present bill, praying a decree against the trustees, that they should repay him, and that a portion of the stock might be appropriated to meet future payments of the annuity. And the M. R., referring to the case of *Parsons v. Briddock*, said, that with regard to the payment the surety had actually made, he was entitled to stand in the place of the creditor, and to be reimbursed out of the dividends; and that he had also an equity to have the fund applied in his exoneration (a), that being provided by the principal debtor, and made subject to the payment of the annuity. *Per* the M. R.—“The question is, whether the Court will act upon that assignment, at the instance of the surety, in whose favour it is not made. The surety is the only plaintiff. The annuitant, who has the assignment of the dividends, does not join. At the hearing I thought the plaintiff entitled to the equity he seeks. Afterwards I had some doubt: but I adhere to my first opinion. I conceive that as the creditor is entitled to the benefit of all the securities the principal debtor has given to his surety, the surety has full as good an equity to the benefit of all the securities the principal gives to the creditor. There is a very strong instance of the application of that equity (that is, the latter equity) in *Parsons v. Briddock*. The principal had given bail in an action. Judgment was recovered against the bail. Afterwards the surety was called upon, and paid; and it was held, that he was entitled to an assignment of the judgment against the bail: so that, though the bail were themselves but sureties, as between them and the principal debtor, yet, coming in the room of the principal debtor as to

(a) In *Heatley v. Thomas*, 15 Ves. 596, the bond of a feme covert as surety was enforced against her separate estate.

the creditor, it was held, that they likewise came in the room of the principal debtor as to the surety. Consequently, that decision established that the surety had precisely the same right that the creditor had, and was to stand in his place. The surety had no direct contract or engagement by which the bail were bound to him; but only a claim against them through the medium of the creditor, and was entitled only to all his rights. There are other cases establishing the same principle, though not quite so strong as that. The surety therefore, with regard to the payments he has actually made of this annuity, is entitled to stand in the place of the creditor, and to be reimbursed out of the dividends, and has also an equity to have the fund applied in his exoneration, that fund being provided by the principal debtor, and made subject to the payment of this annuity."

272. This equity, or right of the surety to have the fund which is charged with the principal debt applied for his exoneration or indemnification, is further illustrated in *Harrison v. Glossop (a)*. There, the receiver of the Opera-house had paid to the tradesmen who supplied it, money which he ought to have paid to the bankers, and his surety advanced him the amount to pay the bankers. The receiver was afterwards discharged on his own application; and a balance being due to him, which included the sum lent by the surety, the Lord Chancellor thought the surety entitled to stand in the place of the receiver to the extent of his demand, and ordered him to be paid accordingly. Standing in the place of the receiver was, in fact, standing in the place of the creditors or tradesmen; for had they not been paid, they might have obtained payment out of the fund in Court. And, probably, it was in this point of view (b) that the surety's claim was admitted; for it appeared, that before the surety applied, the fund had been assigned away by the receiver, so that

(a) Cooper, 61; S. C. 3 V. & B. 135.

(b) *Harris v. Lee*, 1 P. Wms. 483.

strictly standing in his place would have been unproductive to the surety.

273. If the surety is under a disability which prevents his obtaining in his own person, or in a direct manner, the benefit of funds or securities which have been set apart for the creditor, equity will restrain the creditor from proceeding against the surety until he has resorted to those funds or securities. In *Cottin v. Blane* (a), the plaintiff was surety to the defendant for the performance of the charter-party of a ship freighted for Bourdeaux. The charterers were French; the owner, the defendant, was an American merchant and a neutral; at Bourdeaux the ship was detained under an embargo; the charter-party was broken, and the defendant brought an action at law upon it against the plaintiff, the surety. The French government had declared that a reasonable indemnity should be granted for losses sustained through the embargo by neutral owners, and set aside a sum of money for that purpose: and the plaintiff filed his bill to discover whether they had obtained indemnity, and, if they had not, to compel them to proceed to obtain it; and an injunction was prayed for to restrain their proceeding at law until they should have done so: and the Court granted an injunction, upon the plaintiff bringing the money into Court.

Per Macdonald, C. B.:—"The case is peculiar. Undoubtedly the injury done by the French to neutral vessels ought in justice to be repaired by them. They say they will do so. This promise takes it out of the case of a mere unadmitted claim upon their justice. It strikes me, that a Court of equity is to look for the performance of such a promise by the government of France, and not to presume a direct refusal of a right which they admit to exist. But we shall look further into the cases which

(a) 2 Anstruther, 544; *Wright* 1 H. Bl. 137; *Wright v. Simpson*,
v. Nutt, 3 Bro. C. C. 326; S. C. 6 Ves. 728.

have been cited." And afterwards, upon making the decree, the Chief Baron said, "As the existing government of France have promised to indemnify the neutral owners, we are to presume that that promise will be fulfilled. Probably it has already been so in part, but whether any compensation has or can be received, cannot be known till the coming in of Macauley's answer, *who alone was capable of claiming it*. The injunction must be granted, the plaintiff bringing the money into Court."

274. But the existence of a fund out of which the creditor might obtain payment, without resorting to the surety, would not be a ground of defence at law, although the surety could not obtain the benefit of the fund without the intervention of the creditor. Thus in *Folliott v. Ogden* (a), to an action upon a bond, it was pleaded, that the defendant was attainted by the state of New Jersey; that all his estate and effects were confiscated and vested in the people of that State, and in the first place made liable to the payment of all his debts; that a fund was raised more than sufficient to pay them, to which the plaintiff might and ought to have resorted. Upon this plea the Chief Justice (Lord *Loughborough*) said, "The whole amount of it is a ground in equity for relief against a creditor who would make an oppressive use of one security in preference to another; for I perfectly agree with the doctrine of the case of *Wright v. Nutt*, and that if the plaintiff in this action might have recovered his debt out of the fund appropriated to that purpose in New Jersey, and has wilfully omitted so to do, there would be a good reason for equity to interfere. If he might have recovered the whole, this action might, on equitable grounds, be entirely stopped; if only a part, equity would relieve pro tanto. This is every thing except what it ought to be, and comes as near as it could to a plea of judgment; but in a Court of law nothing short of actual payment is good."

(a) 1 H. Bl. 124.

275. Prerogative overrides all the equities. Notwithstanding the provision of Magna Charta (a), that the sureties of a debtor to the crown shall not be distrained as long as the debtor is sufficient, the crown is not obliged to proceed first against the real debtors; the provision being construed not to apply to such sureties as by the form of their engagement are chargeable as principal debtors. *Per Hullock, B.* "This particular provision of Magna Charta is an abridgment of the common law prerogative of the crown; for it is clear that anterior to that charter no such understanding prevailed; does it then affect the present question? That point has already been decided in this Court in the case of *The Attorney General v. Resby* (b), which is reported in Hardres, p. 377, in which several points were adjudged, and amongst others, that Magna Charta does not extend, nor was ever taken to extend, to sureties in a bond or recognizance, if they may be so called, being bound themselves equally with the principal, as sureties to perform covenants and agreements are in like manner, but to pledges and nuncupators only, who by express words are not responsible, unless their principal become insolvent, and so are conditional debtors only. And so the act has always been construed; and the words themselves imply as much." And, therefore, the affidavit on the part of the crown, upon an application for an extent against a surety, need not state that the principal has been applied to for payment, or that he is insolvent (c).

(a) Ch. 8. "We or our bailiff will not seize any land or rent for any debt as long as the present chattels of the debtor suffice to pay the debts, and the debtor himself be ready to satisfy the same; neither shall the sureties of the debtor be distrained, as long as the prin-

cipal debtor is sufficient for the payment of the debt."

(b) See also *Attorney General v. Atkinson*, 1 Y. & Jervis, 212; *Whitehouse v. Partridge*, 3 Swanst. 374.

(c) *Rex v. Marsh*, 1 M'Clelland, 88.

276. But, it seems, a surety to the crown, who has paid the debt, is entitled, on the general principle, to stand in the place of the crown in respect of securities belonging to the debtor. And it is usual to allow him the aid of crown process against the debtor (*a*), and the same aid to recover contribution from a co-surety. As, however, it is now held, that sureties are entitled to stand in the place of the creditor, and have the same remedies as he would have had only in respect of collateral securities, and that the payment of a specialty debt by the surety makes the surety only a simple contract creditor, it would seem to follow (*b*) that the surety ought to be allowed crown process only in respect of such securities, and not against the debtor.

277. If the creditor accepts a composition (*c*) from the debtor, the surety is entitled to a rateable proportion of it; as, if upon a debt of 1000*l.* he accepts a composition of 10*s.* in the pound, the surety being liable only for 500*l.*, the surety is entitled to a deduction of 10*s.* in the pound from the 500*l.*, and the creditor is not permitted to apply the aggregate of the composition as a gross payment, excluding the surety from all benefit from it.

Thus, in *Bardwell v. Lydall* (*d*), the defendant was sued upon a guarantie, in which he engaged to be answerable for Mayhew to any amount not exceeding 400*l.* The guarantie was as follows:—"In consideration of your

(*a*) *Per Macdonald, C. B.* "It is a reasonable practice that the party who has made good to the crown the default of the defendant, should have the same remedy that the crown itself would have had." *Rex v. Bennett*, 1 Wightw. 6. See also *Doughty's case*, *id.* p. 2, n. (*b*), where it is said, a surety paying the crown's debt was ordered to stand in the place of the crown, and to have the aid of the Court

to recover the whole against the principal in the bond, or a moiety against the surety.

(*b*) I am not sure that there is not a fatal infirmity in this inference; but I retain it, as an invitation to inquiry and discussion upon the subject.

(*c*) Accepting a composition discharges the surety. See *antè*, p. 114.

(*d*) 7 Bing. 489.

giving credit in the way of your trade to Lionel Mayhew, I guarantee to you the payment of any debt which he may contract with you from time to time, as a running balance of account, to any amount not exceeding 400*l*." Addressed to the plaintiffs. Mayhew having become embarrassed, assigned his effects to trustees, and under the assignment the plaintiffs received upon 625*l*., the total amount of their claim, a dividend of 8*s*. 7*d*. in the pound. Deducting the aggregate of this composition, the balance left was 356*l*., and this sum the plaintiffs claimed in the present action. The defendants paid 118*l*. into Court, denying their liability to any greater extent, and insisting that the plaintiffs had no right to deduct the whole sum received as a dividend from the gross amount of the debt, but that the dividend was to be applied rateably, and 8*s*. 7*d*. in the pound deducted from the amount of the guarantie. And the Court was of opinion that such deduction ought to be made."

278. The case just stated was decided in analogy to the rule early established in bankruptcy, giving the surety a proportion of the dividends under the proof made by the creditor; the principle of which is embraced in the fifty-second section of the bankrupt act. Of this rule the cases of *Ex parte Rushforth* and *Paley v. Field* are leading exemplifications. *Ex parte Rushforth* was as follows:—Richard Rushforth and Benjamin and William Rushforth were engaged to Seaton & Co. bankers, in a joint and several bond, in the penalty of 10,000*l*., conditioned for the payment to Seaton & Co., two months after notice, of all such sums as they should have advanced to the two obligors, Benjamin and William Rushforth. Richard, the petitioner, therefore, was, in equity, surety for Benjamin and William Rushforth, who afterwards became bankrupt, and, at the time of their bankruptcy, were indebted 20,000*l*. to Seton & Co., which sum Seaton & Co. proved against their estate. The petition was by Richard, the surety, and its object was, to obtain a pro-

portion of benefit from this proof, as to so much of the 10,000*l.* as had not been paid through the medium of securities, on which the surety had a lien; and the prayer of the petition was granted.

The Lord Chancellor, after stating the facts, said, "The agreement was to advance all such sums as should be required; but it is limited by an express contract for an obligation to secure all those sums; and the question is, whether the limitation in the extent of the obligation is not a sufficient ground for the inference that those sums were not to be extended beyond 10,000*l.*, to the destruction of every right of the surety. Take the case of two sureties, each for the separate sum of 10,000*l.*, each paying the principal creditor would be entitled to stand in his place for the sum paid. It would be very strong to hold that, as they have taken but one surety, he shall be in a worse situation. I think the bankers are not entitled, in equity, to say, as against the surety, that their demand is more than 10,000*l.*, the amount of the bond he has given, upon which he would be *prima facie* entitled to stand in their place. As to the residue of their debt, they ought to be considered, if I may so express it, as their own insurers. He is entitled to stand in their place, but not for the whole sum of 10,000*l.*, for the money produced by the sale of the estate must be considered as received by the bankers; he will, therefore, be entitled to stand in their place for the difference, and only for the difference, because no more would be paid by the surety."

279. *Tindal*, C. J. in delivering judgment in *Bardwell v. Lydall* (a), referred to the case of *Paley v. Field* as an authority; the material difference between which and the case of *Ex parte Rushforth* was, that in the former the bond, in which the plaintiff was engaged, afforded a stronger ground of inference that the obligees, the defendants, were not entitled to insist upon the larger amount of their debt, to the prejudice of those rights which the plaintiff, as surety, would have had, if the amount of the

(a) *Ante*, p. 259.

debt had been smaller, that is, if the amount had been the same as the amount of the plaintiff's liability.

Per the M. R. (Sir William Grant):—"I am not able to discover any substantial distinction between this case and *Ex parte Rushforth*. Indeed this is the stronger and clearer of the two, as this instrument marks more distinctly that the sum for which the surety was to be answerable was, as against him, to be considered as the whole amount of the creditor's demand. In that case there was no specified limit to the engagement, except what was implied by the obligation of the bond. The undertaking was to answer for all such advances as the bankers might make: Lord *Eldon*, however, inferred, from the obligation to give notice before there should be a forfeiture of the bond, that as against the surety the bankers would not be entitled to say they had given credit for more than the penalty, so as to affect him in any way by such additional credit. Here, that is not left to inference, for the proviso which qualifies and controls all the rest of the instrument, declares expressly that the true intent and meaning is, that the bankers shall not be indemnified by the plaintiff by virtue thereof for any loss which they should sustain by giving credit to Richard Paley, as aforesaid, beyond the sum of 1500*l.* and interest, anything therein contained to the contrary notwithstanding. I hardly know how the parties could have more clearly provided, not merely that the plaintiff should not be called to answer for more than 1500*l.*, but that with regard to him the creditor should be considered as limited to that sum. Then upon what ground is the equity which the plaintiff seeks by this bill resisted? Upon this ground only, that these defendants have given credit to the bankrupt beyond that stipulated sum, a case with which, by express provision, the plaintiff was to have nothing to do. If in consequence of these ulterior advances, the bankers are to keep dividends of which they would otherwise be trustees for the plaintiff, does not he contribute in effect

to indemnify them for a loss against which it is expressly provided that he shall not be called upon to indemnify them, viz., a loss, occasioned by their advancing more than the sum of 1500*l*.? It is clear that, as between these parties, that sum is to be considered as the amount of the debt. The law resulting from that view of the facts is not a subject of controversy between the parties, for it is agreed upon that statement the plaintiff is entitled to the equity he seeks by his bill, to consider them as trustees for him of whatever dividends they draw from the bankrupt's estate on account of this sum of 1500*l*."

In cases to which the 52d section does not extend, but which are within its principle, a reference to these two judgments will be useful.

280. In *Martin v. Brecknell* (a), the action was brought upon a bond in the penal sum of 18,000*l*., conditioned for the payment, by one Gardiner, of half that sum, and interest, in instalments. The action was brought for the interest and one instalment. The defendant pleaded, that Gardiner having become a bankrupt, the plaintiff had received the instalment in a dividend. The plaintiff denied that the dividend was received for the instalment. At the trial it appeared that the plaintiff had received a dividend of 2*s*. and 7*d*. in the pound upon the balance of the debt, without interest; and as the aggregate of the dividend exceeded the instalment, the question was, whether the dividend was to be applied in satisfaction of this instalment. The counsel for the defendant said he was not able to find any case upon the point; and the Court decided that the defendant was entitled to a deduction of only 2*s*. and 7*d*. upon the amount of the instalment.

281. There is a class of cases incidentally related to the subject of interest of the sureties, a brief notice of which seems necessary: I allude to cases in which the creditor, upon compromising his claim in consideration of some additional security, stipulates with the debtor for some

(a) 2 M. & S. 39.

advantage either not communicated to the surety, or inconsistent with the terms made with the surety. The contract for such advantage is regarded as a fraud on the surety, and cannot be enforced against the debtor.

In *Cecil v. Plaistow* (a), the friends of Mr. Cecil wishing to extricate him out of his difficulties, a compromise was entered into with his creditors, by which it was agreed, that the creditors should accept payment by twelve instalments, and Lord Exeter and Mrs. Cecil, the wife of the plaintiff, joined with him in conveyances to secure these payments. General Plaistow, one of the creditors, acceded to the compromise as to part of his debt, and took from Mr. Cecil a bond for the residue, but represented the sum compromised as the whole of the debt. Soon afterwards he obtained from Mr. Cecil another bond, with a warrant of attorney to confess judgment, for the balance of his claim as it existed before the compromise; and to prevent his taking out execution upon this bond and warrant, the present bill was filed, and an injunction granted.

Hotham, B., with reference to the effect the defendant's signing the deed of composition had upon his reserved claim, said, "We are of opinion the defendant is precluded now from making this demand. It has often been determined, and is admitted by the counsel for the defendant, that where there is a composition to take a smaller sum than the whole debt, a creditor signing it cannot afterwards claim any other debt then due to him. This, indeed, is a composition, not to take less than the whole debt, but only to receive the whole sum in a different manner and at different times; yet it is a composition by which the creditors agree to take the effect of their respective demands in a less beneficial manner than they were before entitled to, and to sign a false schedule, in order to induce them to come into that measure. is to deceive and defraud them.

(a) 1 Anstr. 202.

"The circumstance of the original bond, which remained in his hands for securing the balance, having been exchanged for another, and the present claim being on a bond executed after that deed of composition, cannot help him; the demand existed before, and the mere device of changing the securities cannot do away the nature of the transaction.

"It has been argued that the creditors could not be injured by this concealment, at all events they were entitled to be paid their demands *pari passu* with him; and this is an unfair attempt to gain a superior advantage over them by a fraudulent concealment of the truth.

"Mrs. Cecil is a party materially interested; she joined in the securities, on the faith that she was thereby clearing Mr. Cecil from all his difficulties; and it was held in the case of *Middleton v. Lord Onslow*, that secret and underhand dealings, by which the hopes of the wife were deceived and disappointed, were a sufficient ground to avoid the transactions. We are, therefore, of opinion that whatever might have been the motive of this part of General Plaistow's conduct, his having signed the deed of composition estops him from afterwards claiming any other debt then due and concealed."

At law, also, the principle of this decision has been followed, and no agreement or security can be enforced, by which a creditor would obtain any advantage in addition to that consented to by the surety (a).

(a) See *Leicester v. Rose*, 4 *shott v. Bennett*, 2 Term R. 763; East's R. 372, overruling *Feise v. Jackson v. Lomas*, 4 Term R. 166; *Randall*, 6 Term R. 146; *Cock- Bryant v. Christie*, ante, p. 232.

CHAPTER IX.

OF CONTRIBUTION.

1. *Of the Principle and Rule of Contribution.*

282. The claim of contribution takes place when one of several sureties has paid the whole debt, or more than his share in proportion to the number of sureties, and he calls on the others to contribute their proportion.

This claim was first established in equity; and rests, as it seems, purely in that principle of morality, which disapproves the infliction on one person alone, of a demand to which others, in common with him, have made themselves equally liable; or that one person should exclusively bear the burden of a payment from which others in common with him derive an equal benefit. When, therefore, through the partiality of a creditor, an infraction of this principle takes place, a Court of equity will interpose to remedy it, and will place the sureties relatively to one another in that state of equality with respect to the loss, which corresponds with the equality of their risk and responsibility under their contract. And this is called the right of contribution. In conformity with the principle stated, an equal apportionment of the sum paid by one surety more than has been paid by the others, so that the ultimate loss to each is the same, is the object of contribution in equity.

If, therefore, all the sureties are solvent, an equal division of the debt amongst all, or of the excess paid by any one amongst the others, ascertains the amount of contribution; but if any of the sureties are insolvent, such as are so, in equity, are not reckoned; but the division is made among the remaining solvent sureties.

Thus, where one of three sureties had paid the whole

debt he was allowed a moiety (*a*) for contribution from a co-surety, because the third was insolvent.

But at law, the insolvency of a co-surety is not considered, and the one who has paid can recover from the solvent sureties no more than an aliquot part, regard being had only to the number of the sureties (*b*): which division, it is to be observed, does not realize the principle and object of equity, for it leaves to him who has paid two shares, his own and that of the insolvent, while only one share falls to the other solvent sureties.

283. Both at law and in equity, if a surety who seeks contribution has been reimbursed part of his payment, whether by the debtor (*c*), a counter-security (*d*), or from any source, he must deduct the sum reimbursed, and is entitled to contribution only on the balance (*e*).

(*a*) *Peter v. Rich*, 1 Cha. Rep. 19; *Holl v. Harrison*, 1 Cha. C. 246; *Layer v. Nelson*, 1 Vern. 456.

(*b*) *Cowell v. Edwards*, 2 Bos. & Pul. 268; *Browne v. Lee*, 9 D. & R. 700; S. C. 6 B. & C. 697.

(*c*) *Knight v. Hughes*, 3 Car-
rington & Payne, N. P. C. 467;
S. C. 1 Moo. & Mal. N. P. C. 247;
Rouch v. Thompson, id. 487.

(*d*) *Swain v. Wall*, 1 Cha. Re. 80.

(*e*) In *Ex parte Gifford*, (6 Ves. 805,) Lord Eldon, Chancellor, delivered an opinion on the subject of contribution, which imports a different rule from the above stated. The case was an application in bankruptcy, that a debt proved against the estate of Niblock and Burgess might be expunged. Niblock and Burgess, together with one Baylis, joined in a promissory note for the accommodation of Bedford. The ground of the ap-

plication was, that the creditors had accepted a composition of four shillings in the pound from Baylis the other surety (accommodator). The passages alluded to in the judgment, were, first, the following general proposition:—“The principal is to discharge all the obligations of all the sureties; but they stand, with regard to each other, in a relation which gives rise to this right among others, that if one pays more than his proportion, there shall be a contribution for a proportion of the excess beyond the proportion which in all events he is to pay.” And, secondly, the following remark, intended to explain the foregoing proposition, and to apply it to the case then under adjudication:—“It might be prudent, in this very case, for Baylis (one of the sureties), Bedford’s son-in-law, to say,

284. It need scarcely be observed, that the right of contribution may be waived either impliedly or expressly. In *Swain v. Wall* (a), the plaintiff, the defendant, and another, were jointly bound as sureties for the payment of 300*l.* by one Hunt. The plaintiff paid the whole of the debt, and prayed for a moiety to be decreed against the defendant, as the other surety was insolvent. But it appeared that the three sureties had come to an agreement among themselves, that if Hunt did not pay, they would each pay their respective parts of the debt; the intention of which was thought to be, that each should pay no more than his own respective part, and the Court therefore decreed not a moiety, but only a third part for contribution from the defendant.

285. If also one becomes surety at the request of his co-surety, he is not in general liable to the latter for contribution; and consequently it would seem that in case the creditor obliges him to pay, he is entitled to complete indemnification from the latter.

In *Turner v. Davies* (b), Lord Kenyon, C. J. said, "I

he would pay four shillings, recollecting that Niblock and Burgess, (the other accommodators), must pay more than ten shillings before any demand could be made by them against Baylis." So that the judgment throughout proceeded on the supposition that the two accommodators, Niblock and Burgess, (who, being partners, were considered as one), and Baylis (the other) were liable as between one another, each to half the debt absolutely, and that the right of contribution would not arise until one of them had paid more than that proportion, and that then he would be entitled to contribution only for the excess. But this, as

I conceive, never was the rule of contribution. Indeed, in *Deering v. Winchelsea*, one of the few cases in which the sum decreed for contribution is stated, the decree agrees with the rule laid down in this chapter, and not with the judgment cited. Of course, I attribute the incorrectness to the reporter, and indicate it for the purpose of guarding the reader against the supposition of its being the authorized doctrine of the Court of Chancery.

(a) *Antè*, p. 265, n. (d).

(b) 2 Esp. N. P. C. 478. See also *Thomas v. Cooke*, 8 B. & C. 728.

have no doubt that where two parties become joint sureties, if one is called upon and forced to pay the whole of the debt, he has a right to call upon his co-surety for contribution; but where one has been induced so to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretence for saying that he shall be liable to be called on by the person at whose request he entered into the security:" and, therefore, the defendant, who had become co-surety with the plaintiff, obtained a verdict, the action being brought for contribution.

2. *To what the Right of Contribution extends.*

286. The right of contribution extends not only to the debt, but to all expenses necessarily or reasonably incurred by the surety in consequence of the default of the principal debtor. Thus, if the surety is sued, he is entitled to contribution for the expense of the writ (*a*), for the putting the creditor to the necessity of issuing it, is merely regarded as obliging him to demand payment in a legal and compulsory manner. But the surety is not entitled to contribution for the expenses of defending an action (*b*), because he might have prevented them, and ought to have done so, by paying; a defence being wrongful.

3. *Between whom the Right to Contribution exists.*

287. The right to contribution exists between all sureties of the same degree, whether they are engaged jointly or severally, and if severally, whether they are engaged all in one instrument, or in several instruments, and whether they have a knowledge of one another's engagements or not;—because in all these different cases, a payment by one surety is equally a benefit to all the other sureties.

(*a*) *Knight v. Hughes*, ante, p. 265, n. (c).

(*b*) *Ibid.*

Deering v. Winchelsea (a) is the leading case upon this branch of the subject. Thomas Deering, a younger brother of the plaintiff, had been appointed receiver of the fines and forfeitures of the customs of the outports; and gave three bonds to the crown, each in the penalty of 4000*l.*, with a condition for duly accounting. In one of these bonds the plaintiff, in another Lord Winchelsea, and in the third Sir John Rous joined him as his surety. Thomas Deering became insolvent, and fled, indebted to the crown upwards of 6000*l.*, part of which sum was levied on his effects, and the residue the crown recovered from the plaintiff, who now filed his bill for contribution from the other two sureties, which was granted; for, as the Lord Chief Baron observed, there being several bonds did not touch the principle of contribution, "where all are bound as sureties for the same person," and the same debt.

286. If, upon becoming surety for a debt for which others also are sureties, the intention of any particular surety is, to be liable only upon default of both the principal and the other sureties, those others are not entitled to contribution from him, he being regarded as the surety not only for their principal but for them also. This was decided in *Craythorne v. Swinburne* (b). There, Sir John Swinburne, the defendant, was a surety, in one bond, to the Newcastle Bank, for a sum of money advanced by the bank to Henry Swinburne, his nephew; and the plaintiff was a surety for the same debt, in another bond, in which Henry Swinburne also joined him. The plaintiff had no knowledge of Sir John Swinburne's (the defendant's) engagement; and the condition of Sir John Swinburne's bond was, for payment of the debt if Henry Swinburne and the plaintiff should not pay it. Evidence was received from the bankers, that they understood it to be the intention of the defendant to be called upon only in the

(a) 2 Bos. & Pul. 270.

(b) 14 Ves. 160, overruling *Cooke v. —*, 2 Freeman, 97.

event of the default both of Henry Swinburne and the plaintiff. And the Lord Chancellor dismissed the bill for contribution.

The Lord Chancellor said, " Upon the relation of principal and surety some things are very clear. It has been long settled, that if there are co-sureties by the same instrument, and the creditor calls upon either of them to pay the principal debt or any part of it, that surety has a right in this Court, either upon a principle of equity or upon contract, to call upon his co-surety for contribution; and I think that right is properly enough stated as depending rather upon a principle of equity than upon contract; unless in this sense, that the principle of equity being in its operation established, a contract may be inferred upon the implied knowledge of that principle by all persons; and it must be upon such a ground of implied assumpsit, that, in modern times, Courts of law have assumed a jurisdiction upon this subject: a jurisdiction convenient enough in a case simple and uncomplicated, but attended with great difficulty where the sureties are numerous, especially since it has been held that separate actions may be brought against the different sureties for their respective quotas and proportions. It is easy to foresee the multiplicity of suits to which that leads.

" But whether this depends upon a principle of equity, or is founded in contract, it is clear a person may by contract take himself out of the reach of the principle or the implied contract. In the case of *Deering v. The Earl of Winchelsea*, which I recollect was argued with great perseverance, persons not united in the same instrument were made to contribute, and it was decided that there is no distinction whether they are bound in the same obligation or by several instruments. That case also established that though one person becomes a surety without the knowledge of another surety, that circumstance introduces no distinction. If the relation of surety for the debtor is formed, and the fact is, not that the party becomes surety

for both the principal debtor and another surety, but for the principal alone, it is decided, that whether they are bound by several instruments or not; whether the fact is or is not known; whether the number is more or less; the principle of equity operates in both cases, upon the maxim that equality is equity; the creditor who can call upon all shall not be at liberty to fix one with payment of the whole debt, and upon the principle of requiring him to do justice, and that if he will not, the Court will do it for him.

“ When once it is admitted, as it was in that case, that a man may by contract place himself out of the reach of the principle, you must in every case consider whether the party had done so. It was admitted in that case, that one bond being for 10,000*l.*, and the surety having paid it, Lord Winchelsea having executed a bond for 4000*l.* only, though he was a surety, yet he had by contract taken himself out of the reach of the 6000*l.*, and was liable only to the extent of 4000*l.* It must then be admitted that if one surety can provide that another shall have no demand against him for a moiety of the debt, he may also contract that the other shall have no demand whatsoever against him.

“ The question then is, whether the meaning of this instrument, executed by the defendant, is, that he will be a co-surety, or that the surety in the former instrument was, with reference to him, to be considered a principal. If the real nature of the transaction is to be understood thus, that Henry Swinburne and the plaintiff entered into a bond for 1200*l.* to the Newcastle Bank, Swinburne as principal, and the plaintiff as surety, and Sir John Swinburne, who had no communication, as it appears, with them, proposed to the bank that he should become a co-surety, there is an end of the question; but if not constituting himself a co-surety with the plaintiff, he proposed to the bank only that he would engage to pay them if they could not get payment from either of the others,

then he has by contract withdrawn himself from the reach of the principle; and the plaintiff cannot complain, as the transaction was without his knowledge, that the defendant bound himself to the extent he thought proper."

..... "As to the bond itself, it is clear upon the face of this bond, and according to its language, that the bank and Sir John Swinburne, if at liberty to do so, did consider that this sum of money was to be an advance as between Sir John Swinburne and the bank to the other two. They have no right to complain of it, for there is no contract between Sir John Swinburne and the other two: he might limit his engagement with reference to them as he thought proper; and the bond upon the face of it makes him surety only for the principal and the other surety. But it is clear upon the parol evidence, (and why is not that competent evidence to shew who is the principal and who is the surety, and in order to determine that, to shew to whom the money was advanced,) and why is it not to be admitted, to shew to whom the money was advanced as between Sir John Swinburne and the others. But this goes farther, for the evidence is not in contradiction to, but in support of the instrument, and whether the demand is founded upon the equity only, or upon the implied contract, why should not evidence be admitted to shew that the equity should not be applied, and the contract ought not to be inferred."

"I do not state that the circumstance, that Sir John Swinburne entered into this security without the knowledge of Craythorne, would have repelled the doctrine of contribution, as that stands upon this, that all sureties are equally liable to the creditors, and it does not rest with him to determine upon whom the burthen shall be thrown exclusively, that equality is equity, and if he will not make them contribute equally, this Court will finally, by arrangement, secure that object. But then the question comes round, whether that is according to the contract or engagement with the surety. My opinion is wrong if Sir

John Swinburne is a co-surety. Having considered this much, and given great attention to the case in *Freeman*, I think he is not a co-surety; but, as between him and Craythorne, the latter is just as much a principal as Henry Swinburne. The consequence is, that the equity does not apply, Sir John Swinburne being liable only in case the other two do not pay, and not being liable with them."

"This bill must therefore be dismissed, but without costs."

Of the Discharge of the Surety from Contribution.

289. An agreement by the creditor to give time to one surety does not discharge the other from a liability for contribution.

Dunn v. Slee (a) was an action by one surety against a co-surety, to recover an aliquot share of a sum of money paid by the plaintiff under a bond executed by him and the defendant, jointly with some others, to indemnify Brown & Co., bankers, against any loss they might sustain in certain transactions with J. Slee, the defendant's brother. The bond bore date January, 1809, and it was upon a condition that it should not be put in suit until after three months' notice. Brown & Co., trusting to this bond, for some time dealt with J. Slee, but becoming suspicious of his solvency, they gave the plaintiff notice, and, at the end of the year 1814, called on him to pay 3000*l.*, which J. Slee then owed them. The plaintiff not being able to pay at the time, gave Brown & Co. a warrant of attorney for the 3000*l.*, bearing date the 1st of January, 1815, with a defeazance, that the warrant should be void if the money should be paid on or before the 1st of June, 1816; and upon giving the warrant of attorney, the bond was delivered up to the plaintiff. To this arrangement the defendant was not privy, and it was contended, on his behalf,

(a) 1 J. B. Moore, 2; *et Holt*, N. P. C. 399.

that he was discharged by it. Verdict for the plaintiff, and the Court refused to disturb it.

Per Curiam.—"The notice was given by Brown & Co. on the 23d of July, 1814, to all the co-sureties, who were each jointly and severally liable under this bond. The plaintiff was called on for payment of the whole amount when his co-sureties had failed. He has, therefore, his action against the defendant for contribution, although Brown & Co. had given him further time for payment."

290. A surety, in case of bankruptcy, is discharged from contribution as to payments made by any co-surety before the issuing of the commission; because the claim of contribution in respect of such payments constituted a debt proveable under the commission: but as to payments made by any co-surety after the issuing of the commission, the bankrupt, as I conceive, is liable to contribution, because the surety paying, in such a case, is not a creditor able to prove in virtue of the general sections (46th and 47th (a)) of the bankrupt act; nor, as it seems to me, is he within the 52d, or any other of the special sections. In *Browne v. Lee* (b), the plaintiff, one of the sureties of an annuity, paid arrears of the annuity after the bankruptcy of the defendant, his co-surety, and claimed contribution; and the Court held the action maintainable, and that the plaintiff was not an annuity creditor within the meaning of the 17th section of the statute 49 Geo. 3, c. 121, corresponding (partly) with the 54th section of the present bankrupt act, (6 Geo. 4, c. 16).

(a) The persons within these sections are, "creditors of the bankrupt," and "persons with whom the bankrupt has contracted any

debt or demand before the issuing of the commission."

(b) *Ante*, p. 265.

ADDENDA.

Of the Consideration.

(See page 6, et seq.)

IN *Willatts v. Kennedy* (a), the question was as to the sufficiency of the consideration.

The plaintiff, it appeared, was appointed by the Court of Chancery receiver of the debts of the firm of Boeme and Smout; and in consideration that the plaintiff, as such receiver, would give one Charles Kennedy, who was indebted to that firm, two months' time, the defendant promised to pay in case Charles Kennedy omitted to pay within that time.

To the consideration it was objected, that the defendant had no authority to give the time, the giving of which was the consideration declared upon, and therefore that there was no consideration: but the Court thought it sufficient.

Tindal, C. J. said, "I think there is no ground for arresting the judgment on the second count in this declaration. The count states, that one Charles Kennedy was indebted to the firm of Boeme and Smout in the sum of 25*l.* 2*s.*; that the plaintiff was appointed by the High Court of Chancery receiver of the debts due to the firm; whereby Charles Kennedy became liable to pay the plaintiff, as such receiver, the said sum of money when he should be thereunto requested; there is, therefore, a distinct allegation of Charles Kennedy's liability to pay the plaintiff when requested. It is objected, however, that this Court cannot take judicial notice of the office of receiver; but, after verdict, we may assume that it was proved that the plaintiff had a right to enforce payment to

himself in the capacity of receiver. And as to the objection, that there is no consideration for the defendant's promise, it is sufficient to observe that the plaintiff did not interfere as a stranger in the concerns of the firm for which he was appointed receiver: it was his duty to require the debtor to pay, and the duty of the debtor to pay him. The contract, therefore, to forbear to proceed against the debtor was a contract from which the plaintiff might incur a detriment; and it is a sufficient consideration for a contract if one party receives a benefit, or the other is exposed to a detriment from it. We must assume it to have appeared that a receiver is liable to answer to the Court of Chancery, and that therefore it might be a detriment to him to give time, when his duty in the first instance was to require payment. Boeme and Co. could not have put this matter in suit against the defendant, and it would be too much to say that he should be answerable neither to the receiver nor to the creditor. After verdict the plaintiff is sufficiently connected with the cause of action; there is no ground for considering him a stranger."

Of the Statement of the Consideration.

(See page 13, et seq.)

IN *Cole v. Dyer* (a), the action was upon the following guarantie:—

"We, the undersigned, jointly and severally undertake and agree to pay George Cole, Gent. the debt and full costs in this action, provided, on or before the first day of January, 1831, a sum of 11*l.* 10*s.* 3*d.* be not paid to him, the said George Cole, at his office, as the attorney for the plaintiff." Dated, &c. and signed by James Ashdown and the defendant: and declared void, because it does not contain a consideration.

(a) 1 Crompton & Jervis, 461.

Lord *Lyndhurst*, C. B. said, "On looking at this instrument, various interpretations might be put upon its language, and several considerations without much ingenuity conjectured. It appears to me, that if in such a written agreement to be answerable for the debt of another person two distinct considerations may with equal probability be inferred as the inducement for that engagement, the writing is not taken out of the operation of the statute of frauds, and consequently can give no right of action."

And *per Bayley*, B. "I do not know how to distinguish this case from *Saunders v. Wakefield*. The consideration in that case, as stated in the declaration, was similar to the present, namely, to cease to prosecute and stay all further proceedings in an action alleged to be depending against one W. Pitman for the amount of a bill of exchange drawn by him: the agreement of the defendant there was, "Mr. Wakefield will engage to pay the bill drawn by Pitman in favour of Stephen Saunders." There was nothing there to shew that forbearance to proceed in the action was the consideration upon which Wakefield made that promise, nor would the Court make any such implication. What is there, then, in this guarantee substantially different, or from which we can plainly and directly know or imply that the dropping of the action between Ridley and Ashdown was the consideration upon which it was given? It appears to me that there is no language which can lead necessarily to this inference, and if any other agreement can be supposed to have existed, the consideration stated in the declaration cannot necessarily be implied. It may be that some other agreement existed with Ashdown, by which the plaintiff was to wait for payment by him till the 1st of January; and afterwards, in consequence of some benefit conferred by Ashdown upon the defendant, he may have undertaken to pay the plaintiff if Ashdown did not. The actual consideration is not sufficiently expressed to take the agreement out of the provisions of the statute of frauds."

In the case of *Wood v. Benson*, referred to in page 13, n. (b) (where the contract is stated) and since reported (a)), Lord *Lyndhurst* said, "The contract resolves itself into two parts. One is, 'I engage to pay for all the gas which may be consumed,' &c.; that is a distinct engagement. The other part is, 'and I do engage to pay all arrears;' now this latter part cannot be sustained, for if it be a distinct engagement there is no consideration to support it expressed on the instrument.

"The question then is, if I undertake to pay for goods which may be supplied, though there is no promise to supply the goods, whether, when the goods are supplied, a right of action does not accrue to recover the amount. It is quite clear that it does. And though the latter part of the engagement cannot be sustained under the first part of the engagement, the plaintiff is entitled to recover for the gas subsequently supplied; and therefore the verdict must stand for 15*l.* 4*s.* 6*d.*" And the learned Lord Chief Baron distinguished the case from the following of *Thomas v. Williams* (b). "The case of *Thomas v. Williams* may, as it appears to me, be supported. Part of the contract in that case was void by the statute of frauds. The declaration stated the entire contract, including that part of it which was void; and therefore the contract, as stated in the declaration, was not proved. The same observation applies to *Lexington v. Clarke* (c), and *Chater v. Becket* (d), and I have no disposition to complain of those decisions; because in none of those cases does there appear to have been any count upon which the plaintiff could recover. But the question in the present case is widely different."

Bayley, J. said, "I am entirely of the same opinion. I consider this contract as consisting of two branches; and it appears to me that, as to the latter, there is no sufficient consideration to sustain the promise. But I am

(a) 2 Crompton & Jervis, 94.

(c) *Post*, p. 283.

(b) *Post*, p. 281.

(d) *Ante*, p. 63.

of opinion that there is no objection to that part of the agreement which relates to the gas to be supplied subsequently to the guarantie.

"I take it to be perfectly clear, that an agreement may be void as to one part, and not of necessity void as to the other. There are many cases in the books where a contract has been held good in part and bad in part. A bond may be good, though the condition is good in part and illegal in part.

"In many cases a distinction has been taken as to what is illegal at common law, and what is made illegal by particular statutes; and it has been said, that the latter would vitiate the whole instrument, the former not.

"I am, therefore, of opinion, that it by no means follows, that because you cannot sustain a contract in the whole, you cannot sustain it in part, provided your declaration be so framed as to meet the proof of that part of the contract which is good.

"In each of the cases referred to for the purpose of shewing that the contract, if void in part was void in toto, there was a failure of proof (a). The declaration in each of those cases stated the entire promise, as well that part which was void as that which was good. I think, therefore, that these cases are to be supported on the principle of the failure of proof of the contract stated in the declaration; but they do not establish that if you can separate the good part from the bad, you may not enforce such part of the contract as is good. I am, therefore, of opinion that the verdict must stand for the amount of the gas subsequently supplied."

(a) The "failure of proof" alluded to, if that was the expression used by the learned Baron, was, I presume, the absence of written evidence of that part of the promise which could be valid only in writing; in which respect the case referred to is contrasted with the

one under consideration; for, in the latter, the contract not only was divisible, but there was a count (as it would seem from the argument, though not by the report,) upon that division of it in which the consideration was sufficiently stated.

What Cases are, or not, included in the words "Special Promise, &c."

(See page 36, et seq. sect. 58 and 80.)

IN *Thomas v. Williams* (a), the defendant, an auctioneer, about to sell on premises of which the plaintiff was the landlord, the goods of the tenant, promised verbally to pay the plaintiff the rent then due, *and also the rent that would be due at the Michaelmas then next following*, in consideration of the plaintiff's not distraining: and in the second count of the declaration the breach alleged was, the non-payment of the rent due at the said Michaelmas then next following. It being objected, that the promise was within the statute of frauds, the judge directed a verdict to be entered for the plaintiff on the second count, for 22*l.* 10*s.* (which was a sum formed partly of rent due at the Lady-day preceding the promise, and *partly of the rent which became due at the following Michaelmas,*) and gave the defendant leave to move to enter a verdict for him; and, upon motion for this purpose, the Court made the rule absolute.

Lord Tenterden, C. J. delivered the judgment of the Court as follows:—"We are of opinion that this action is not maintainable. One Thomas Thomas was tenant to the plaintiff of certain premises, and indebted to the plaintiff in a sum of about 17*l.* for rent due at Lady-day. In August the defendant, an auctioneer, was about to sell the goods of the said tenant on the demised premises. The plaintiff came to the premises, and required security for his rent. The defendant promised, that if the plaintiff would allow the sale to proceed, he would pay the arrears of the rent then due, and also the accruing rent up to Michaelmas next. This promise was by word only, without writing. Some money had been paid, but not quite so much as the amount of the arrears due at Lady-day.

(a) 10 B. & C. 664.

At the trial a verdict was given for the whole difference between the amount of the money paid and the amount of the rent up to Michaelmas, including in that amount the arrears of the rent due at Lady-day. The question is, whether the plaintiff could recover the whole of that sum, or the difference between the money paid and the arrears due at Lady-day? or whether the whole contract was void? We think the whole was void. Several cases were quoted at the bar in support of the plaintiff's claim, but there is no case in which the promise of payment has gone beyond the amount of the right vested in the party to whom the promise was made, or beyond the assumed value of the fund out of which the payment was to be made. In *Edwards v. Kelly* (a), the landlord, to whom the promise was made, had actually distrained the goods of his tenant and delivered them to the defendant to be sold in consideration of his promise to pay the rent due, for which the distress had been taken. In *Castling v. Aubert* (b), the plaintiff gave up to the defendant policies of insurance, on which the plaintiff had a lien, to secure himself against bills which he, on the faith of that lien, had accepted for the accommodation of the assured, and the person to whom he delivered them promised to discharge the bills and give to the plaintiff the same indemnity that his lien afforded him. In these cases the promise was founded on a new consideration, distinct from the demand that the plaintiff had against the third person, although its performance would have the effect of discharging that demand and releasing that person. In *Williams v. Leper* (c) there was no actual distress, but there was a power of immediate distress, and an intention to enforce it, and I think the judges must have considered that power as equivalent to an actual distress. It is not necessary now to decide whether it was rightly so considered (d), because,

(a) *Antè*, p. 48.

(b) *Antè*, p. 50.

(c) *Antè*, p. 45.

(d) See *Wood v. Nunn*, *antè*, p. 46, n. (a).

supposing it to have been rightly so considered, the decision will not go beyond the amount of the arrears then due, and for which the right of distress might have been immediately exercised. But this reasoning will not apply to the accruing and future rent. The plaintiff could not have distrained for that rent. The defendant by paying all that was due at Lady-day might have proceeded to sell the goods. If that sum were paid or secured, the plaintiff sustained no loss or detriment by the sale of the goods. So that the promise to pay the accruing rent exceeded the consideration, and cannot be sustained on the ground on which the cases referred to are to be sustained, but is nothing more than a promise to pay money that would become due from a third person, and is within the words of the statute and the mischief intended to be remedied thereby. And as to so much, therefore, the promise is void by the statute. The next question, then, is, whether the promise being void in part can be held good as to the other part, viz. the arrears due at Lady-day in respect of which it might have been good if confined to those arrears. And upon this point the two cases of *Lexington v. Clark* (a) and *Chater v. Becket* (b), quoted in the argument, are authorities directly in point against the plaintiff. In each of them the promise was as to a part held not to be within the statute, and as to a part to be within the statute, and the actions proceeded for the recovery of the part not within the statute, the other part having been satisfied. But it was held that the promises were entire, and that being in their commencement void in part they were void altogether. For these reasons and upon these authorities we think the plaintiff can recover nothing. The rule for entering a general verdict for the defendant must therefore be absolute."

In *Lexington v. Clarke* (a), the defendants were husband and wife: the declaration stated, that the plaintiff had

(a) 2 Ventris, 223. •

(b) *Ante*, p. 63.

demised to the former husband of the female defendant certain land at the rent of 320*l.* per annum, half a year of which rent was in arrear; and that, in consideration that the plaintiff would permit the female defendant to hold the premises for a certain time after the decease of her former husband, and to remove divers posts, rails, and other things fixed and placed upon the premises by her said husband, she promised to pay the plaintiff as well the half year's rent, as also 260*l.* more. The latter sum was for her own enjoyment of the premises. A special verdict was found, stating the promise to be as declared upon, but that it was not in writing; that the female defendant enjoyed the lands, and took away the posts, &c., and had paid the 160*l.* but not the 260*l.*, nor any part of it.

“ By the opinion of all the Court, judgment was given for the defendant: for the promise as to one part being void, it cannot stand good for the other; for it is an entire agreement, and the action is brought for both the sums, and indeed *could not be otherwise*, without variance from the promise.”

Of the Extent of the Contract of Surety.

(See page 66, et seq.)

In *Farebrother v. Worsley* (a), the action was brought by the sheriff of Middlesex against the executors of a deceased surety of a bailiff, upon a covenant that the bailiff should pay the sheriff the costs and charges of defending any action, or of prosecuting or opposing any motion, &c. touching or concerning any matter wherein the bailiff should act, or assume to act, as bailiff to the said sheriff; and should indemnify the sheriff against all actions, costs, &c. which might be commenced, or which the sheriff might suffer, pay, or be liable to, for or by reason of the executing, not executing, returning, or not

(a) 1 Crompton & Jervis, 549.

returning, or mis-return of any writ, process, mandate, precept, or warrant, occasioned by the act or default of the bailiff.

The Court held, that under the terms of this covenant the sheriff was entitled to be indemnified not only from costs incurred in consequence of the wrongful act of the bailiff, but also from those incurred in an action brought against him in consequence of a return made by the sheriff to a writ, on instructions given by the bailiff, though those instructions were correct and proper.

Lord *Lyndhurst*, C. B. said, "The substantial question intended to be raised upon this record, and which was discussed yesterday, is, whether, where the bailiff had acted properly in the discharge of his duty by making a proper return to the sheriff, and costs and charges have been incurred by him, the bailiff and his surety be liable for such costs and charges. It appears to me that the case I have stated falls distinctly within the language of one of the covenants; and on looking through the rest of the instrument for the purpose of ascertaining whether there is any other covenant or provision to qualify or restrain the meaning of the one in question, it does not appear to me that there is any thing to justify me in declining to put upon the covenant I have alluded to the meaning which its terms naturally import. The part to which I refer is this, 'that the bailiff shall pay, &c. to the sheriff, &c. the costs and charges of defending any action and of promoting or opposing any motion in, or application to the Court, touching or concerning any matter wherein the bailiff should act or assume to act as bailiff to the said sheriff.'" In this case, the bailiff pointed out the return to be made on the writ. On that return an action was brought against the sheriff, and costs and charges were incurred by him. These, therefore, were costs and charges in defending an action in a matter wherein the bailiff acted as bailiff to the sheriff, the now plaintiff. They, therefore, fall precisely within the words of the

deed, and I see nothing to prevent those words from taking effect."

In *Ikin v. Brooks* (a), an action on a promise of indemnity (not a proper contract of guarantie), a letter was given in evidence, in which the defendant, after acknowledging the receipt of two promissory notes from the plaintiff for the respective sums of 100*l.* and 400*l.*, proceeded thus, "it is understood and agreed between us, that *in consideration of the money so secured to be paid to us as aforesaid*, we hereby indemnify you," &c. Upon the question of the construction of the letter, whether the security for the payment of the 500*l.*, or the actual payment of that sum, was the consideration for the indemnity, the Court thought the security, and not the payment, was the consideration, and therefore the plaintiff obtained judgment for his indemnity, though the whole of the two notes had not been paid.

Of the Extinguishment of Suretiship.

(See page 127, section 159, et seq.)

In *Combe v. Woolf*, a case tried in Hilary term, (2 W. 4) and argued before the Court of Common Pleas in the same term, the action was brought upon the following guarantie:—"Messrs. Combe, Delafield & Co. London. Gentlemen, I hereby guarantie and engage to see you paid for any porter you may send to Mr. Abraham Joseph, of this town, until you receive notice to the contrary from me." Signed by the defendant. Porter was sent at different times, and the credit on the first invoice, and also in those of the succeeding invoices in which any credit was mentioned, was stated to be "six months." This credit having expired, the plaintiffs applied to Joseph for

(a) 1 B. & Adol. 124.

payment for the porter, the price of which was claimed in the present action. Joseph, in consequence, remitted a promissory note at two months for the amount, the receipt of which the plaintiffs acknowledged in the following letter:—"Sir, We have yours of the 1st instant, inclosing bill value forty-five pounds: as the amount is overdue, we expected cash remittance in lieu of the above; we request attention to this in future," &c. Signed by a clerk of the plaintiffs. For the defendant it was contended that this acknowledgment was evidence of an agreement to give time to Joseph until the period upon the note expired, and therefore that the defendant, the surety, was not liable. The question was left to the jury, who said, "We find no notice given to the defendant as to credit." "As practical men we find that the money was demandable at the end of six months, but we consider that the plaintiffs might take a bill, and that it did not put an end to the guarantie."

There was also a question as to the extent of the defendant's liability. The guarantie is expressly for PORTER; the plaintiffs, besides the claim for porter, claimed a balance upon an account for casks not returned by Joseph, and the verdict included this sum as well as the former. But the Court granted a new trial, expressing an opinion that there was evidence of an agreement to give time, and therefore that the defendant was not liable: and seemingly also the Court thought the guarantie did not extend to the casks, but that if it did, still the plaintiffs were not entitled to recover the demand in respect of the casks in the present action, the declaration being adapted only to the demand for porter.

The opinion of the Court as to the first point, turning as it does chiefly upon the effect of the plaintiff's letter acknowledging Joseph's remittance, coincides in a great degree with that of the Court of K. B. in *Shipton v. Casson* (a). There the defendant was the principal debtor;

when due, the defendant's surety paid the debt in bills instead of money; which payment the plaintiffs acknowledged in the following manner:—"Yours of the 27th is received this day, inclosing bills and note, which will pass to your son's account when due:" but before the bills became due the plaintiff brought this action, and the Court held it not maintainable. *Abbott, C. J.* said, "I agree that the plaintiffs were not bound to accept it," (viz. the remittance of bills in lieu of money); "they might have returned it, and insisted upon their right of action. But instead of that they made the amount available to their own purposes, and undertook to place it to the credit of the defendant's account; having done so, as against the plaintiffs it must be taken that there was no objection to the nature of the remittance:" and therefore, until the bills became due, it was held, the plaintiffs had suspended their remedy against the principal; à fortiori, the acknowledgment having such an effect, discharges the defendant in the other case, who is a mere surety.

—♦—

*Of the Effect of the Creditor's discharging one Surety
with relation to the Liability of the other Sureties.*

IN page 118 I postponed for a future consideration the question of the effect of the creditor's discharging one of his sureties, with relation to the liability of the remaining sureties.

In *Austen v. Howard* (a), the plaintiff, sheriff of Surrey, had paid to the avowant in replevin 284*l.* as damages, for having taken insufficient pledges upon the replevin, and to recover this sum from the defendant, who was surety in the replevin-bond, he brought the present action. The plaintiff, as sheriff, ought to have taken two sureties, instead of which he only took one, the defendant; on whose behalf, consequently, it was contended that the bond was void; but

(a) 1 J. B. Moore, 68; 7 Taunt. 327.

the Court thought the bond good, and that the question was merely as to the extent to which the sheriff should now be entitled to recover. "The justice of the case," said *Gibbs*, C. J. "appears to be this: the sheriff ought to have taken a bond from two sureties. If he had done so, the defendant would be liable as a co-surety only; the plaintiff, therefore, is entitled to recover the moiety of the damages from the defendant, which the jury awarded in the action brought against him as sheriff. The judgment, therefore, should stand for 14*2l. 5s.*" (half the amount paid by the sheriff).

It may, however, be observed that the case of the sheriff upon a replevin is peculiar, for he is under an *obligation* to take two sureties, and those sufficient sureties; and their bond being several as well as joint, he ought, it would seem, to take two, each of whom is sufficient to the full extent of the joint obligation; so that, if he does his duty, one of the sureties paying the whole sum recoverable upon the replevin-bond, is not only entitled to contribution in point of law, but is at all events sure to obtain it: but in the case of a common creditor who has discharged one of his sureties, and so deprived the others of the right of contribution, I believe it has not yet been decided to what extent, or whether at all, these shall be relieved, in consequence, from the demand of the creditor.

In page 124 I have referred to the cases of *Bulteel v. Jarrold* (a) and *Davey v. Prendergrass* (b). In the former, to an action upon a recognizance of bail, the bail pleaded, that the plaintiff, without his privity, had agreed to take security from the principal; and upon demurrer to this plea, on the ground that an agreement by parol could not be pleaded in bar of an obligation by record, the Court gave judgment for the plaintiff, and the House of Lords affirmed the judgment; but the Lord Chancellor at the same time recognized the sufficiency of the matter pleaded

(a) 8 Pri. 467.

(b) 5 B. & Ald. 187.

as a ground of relief in equity. In the latter case also it was decided upon demurrer not to be a valid defence to an action upon a bond, that the obligee had agreed by parol to give time to the principal debtor.

The case alluded to in page 157, s. 191, but the name of which is omitted, is *Curling v. Innes*, 2 H. Bl. 373.

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THE END.

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